Gaekwad's Oriental Series

Published under the Authority of the Maharaja Sayajirao University of Baroda.

General Editor:
G. H. Bhatt, M.A.

No. CXXVII

Introduction to VYAVAHĀRAKĀṆḌA of KṚTYAKALPATARU

(with Index)

INTRODUCTION TO

VYAVAHĀRAKĀṆḌA

OF

KṚTYAKALPATARU

(with index)

OF

LAKṢMĪDHARA

BY

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ORIENTAL INSTITUTE,
BARODA
1958

PREFACE

The *Vyavahārakāṇḍa*, the twelfth Section of Lakṣmīdhara's *Kṛtyakalpataru* was published in 1953 as No. CXIX in the Gaekwad's Oriental Series. The learned editor, Principal K. V. Rangaswami Aiyangar, remarked in his Preface to that volume that ' an English Introduction giving a comparative examination of the views expounded in the Kāṇḍa, in relation to the literature to which it is a contribution, and an Index of half-verses would appear in a Supplementary Volume owing to the extraordinary bulk (pp. 846) of the text of the *Vyavahārakāṇḍa*.

It now gives us great pleasure in publishing the promised Supplementary Volume as No. CXXVII in the GOS. It is hoped that the treatment of the subject by one who has devoted a major part of his life to a critical study of the Dharmaśāstra will be found most thoughtful and thought-provoking. Other parts of the *Kṛtyakalpataru* are under preparation and will be published without any delay. The active literary life of Principal Aiyangar even in his advancing age is very admirable.

Oriental Institute,
Baroda.
26-2-1958.

G. H. BHATT

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CONTENTS

PART TWO : SUBSTANTIVE LAW

Vyavahārapada

OM ŚRIYAI NAMAḤ

INTRODUCTION

Preliminary

Lakṣmīdhara devotes the twelfth section (*kāṇḍa*) of his digest (*nibandha*) to an exposition of legal procedure and civil and criminal law. These are all based ultimately on Dharma, whose nature and sources have been dealt with in the first *kāṇḍa*. The section which immediately precedes that on *Vyavahāra* is that on *Rājadharma*. Both are oriented to the four-fold aims of existence and the ways of securing them. These are dealt with in the first nine sections of the Digest, and are summed up in the last section which deals with emancipation (*Mokṣa*). In the *Rājadharmakāṇḍa* (p. 154), Lakṣmīdhara cites two verses as from Nārada [1] to show that vital features of regal duty can be summed up as constant attention and help to good men, and the restraint of bad men, and that they may be further regarded as protection (in the widest sense) of subjects (*prajārakṣā*), subordination or submission to the aged and wise, seeing to the settlement of disputes between men (*darśanam vyavahārāṇām*) and protecting himself, *i. e.* as the embodiment of the State. The elaboration of the last two, among these duties, will show how *Vyavahārakāṇḍa* is the natural supplement of that on *Rājadharma*.

Definition of Vyavahāra

Vyavahāra is used in different senses. In popular usage, it means only a transaction or proceeding. It denotes also a law-suit or a dispute which is taken before a court of law for settlement. *Vyavahāra* is sometimes used in the restricted sense of legal procedure. Thus, Caṇḍeśwara deals with only legal procedure in *Vyavahāra-ratnākara* and so does Vācaspatimiśra in his *Vyavahāra-cintāmaṇi*. Both use the word *vivāda* (ordinarily used in the sense of a dispute or a law suit) in place of *vyavahāra*. Jīmūtavāhana in his classical treatise on judicial procedure (ed. Sir A. Mookerjee, 1912) avoids ambiguity by using the expression *Vyavahāramātṛkā* as the title of his book. Most treatises on *Vyavahāra* deal, as is done by Lakṣmīdhara, with both procedure and substantive law, *e. g.* Varadarāja's *Vyavahāranirṇaya* and Nīlakaṇṭha's *Vyavahāramayūkha*.

Lakṣmīdhara uses the word *vyavahāra* in the wider sense. He defines *vyavahāra* (p. 8) as the subject of a dispute between a plaintiff and a defendant

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[1] The first of the two verses is found in the printed *Nāradasmṛti* (ed. Jolly), XVII, 17. The second verse is found in the printed text, p. 220 (XVII, 33) with *dharma* in place of *vṛtti*. The two do not run continuously.

in a court of law (*arthi-pratyarthinor vivāda-viṣayaḥ*). He cites (p. 40) the well-known etymology of the term by Kātyayana as a proceeding that removes (*hāra*) various (*vi*) doubts (*ava*) in a court of law. The verse that precedes the one in which the etymology is given has been variously explained by digests, and illustrated by examples.[1] A legal position (*dharmākhya*) has to be established by effort, as by the production of evidence, as in the case of a landed estate in which there has been an interruption of occupancy (*bhoga*) which is taken before a tribunal. Vijñāneśvara (II, 1) defines *Vyavahāra* as the assertion of one's rights as against the opposition of another (*anyavirodhena ātma-sambandhitayā kathanam vyavahāraḥ*). Lakṣmīdhara, in explaining " *vyavahāra* " in a *sūtra* of Gautama, defines it as that which helps to establish a final decision (*vyavasthā-sādhanam*), and brings under it the sources of Dharma, like the Vedas and their Aṅgas, the Upavedas, Purāṇas, Dharmaśāstra and Arthaśāstra. Buhler, on the other hand, translates *vyavahāra* in the *sūtra* of Gautama (XI, 21) as " administration of justice. " (*infra*, p. 12).

The King as Administrator of Justice

As the adjudication of disputes and the administration of justice generally, including the punishment of persons guilty of crimes, constitute regal (or State) responsibility, Manu's description of how the King should begin to function in this way is cited, to begin with, by Lakṣmīdhara (p. 7). The king is the fountain of justice. To fulfil this duty, he has to enter the hall of justice daily, on the second eighth part of the day, *i.e.* between 7-20 and 9 in the forenoon to look into disputes. He may remain in court till noon. He should be accompanied by Brāhamaṇas, along with ministers. That this was not a mere ideal but was actually practised by even powerful rulers is shown by the testimony of Megasthenes (Frag. XXVII.) who states that " the king (*i. e.* Candragupta Maurya) remains the whole day in court, without allowing the business to be interrupted. " Kautilya rules that when in court, the king should be easily accessible to litigants and he should not allow them to wait long. (*Arthaśāstra*, I, 19). The court of justice has been described as *dharmasthāna*, *dharmāsana* (Manu, VII, 23) and *dharmādhikaraṇa* (Kātyāyana, verse 52). Kālidāsa and Bhavabhūti use the term *dharmāsana* to describe a court of justice.

The King must enter the Court of Justice, accompanied by learned Brāhmaṇas, who are ' skilled in doing things that are appropriate to place and time ' (p. 8) and by able ministers, and he must do so in a humble way (*vinītaḥ*), obviously as a mark of his feeling of heavy responsibility. He should not cause fear or embarrassment to suitors by appearing in regal splendour. He should daily administer justice according to the dicta of *śāstra* and custom. He

[1] See *Kātyāyanasmṛti*, Eng. Trans. by P. V. Kane, 1933, p. 122

should begin his work as judge after worshipping the guardians of the quarters (*lokapālāḥ*). The king should control himself and not show anger (Yājña-valkya, II, 1), nor be covetous (*lobhavivarjitaḥ*)*i. e.* have any personal interest in the suit before him. His advisers should be experts in Dharmaśāstra and Arthaśāstra. Dharma resides in good men, and the source of Dharma, in administration, is the King acting as a judge (p. 10). He should, as far as possible, in the many calls on his attention, administer justice in person and impartially (*a-pakṣāntara*, p. 11). His ideal should be Yama, the Judge of the Dead (p. 11). A wrong decision of a previous ruler should not be treated a precedent (p. 11). When smṛti rules seem to be in conflict, he should follow that rule which seems most reasonable (*yuktiyukta*) and equitable (*nyāyya*). If there is a conflict between a rule of Dharmaśāstra and a precept of Arthaśāstra, the former should prevail. Enjoyment without interruption of a property for three generations is held by some Smṛtis to be a source of ownership, but if it is *strīdhana*, he who enjoys it is to be punished as a thief (p. 14) and prescription will not apply. It is so also with regard to the king's property, (Nārada, II, 75). The king should try to trace truth in conflicting depositions, as a hunter can trace animals by their hoof marks (p. 15). Skilled liars may speak falsehoods that seem to be truths. The king should show skill in unravelling falsehoods and discovering truth. A king who shows such skill as a judge wins this world and the next (p. 17). The king who does not attend to suits, thinking only of his comfort will be "burnt" (in after-life). The king, as judge, should not overlook a clear rule, and decide by mere fiat, as such a course will mean ruin to him (p. 18).

Customary Laws (*Deśācārādi*)

The principle to be followed in regard to customs and usages is laid down by Gautama (XI, 20.21): they should not be opposed to sacred texts. With this provision, cultivators, tradesmen, herdsmen, artisans and money-lenders can make rules to be followed by their respective classes. Family customs, caste usages etc. should not run against Śāstra, and if they do so, they will be invalid (p. 20). Even in the case of the usages of *pratiloma* born castes, their validity will be upheld unless they are contrary to śāstras. To ignore such customary law will cause discontent (*prajāḥ prakṣubhyate*, p. 20). As illustrations, we have Bṛhaspati's rule that among the people of the south (*dākṣiṇātya*) cousin marriages, the eating of beef by artisans in Madhyadeśa, and of fish in the Eastern regions, etc. are to be allowed for the parties following them, and they are not to be called on to perform expiatory rites. Lakṣmīdhara cites Gautama's rule that those who follow such practices have authority to do so, so long as they are not in conflict with sacred precepts (*āmnāyaiḥ aviruddhāḥ pramāṇam*, p. 19). The king should give a decision in matters of such usages,

after having learnt them from those in each class or tribe or group who have authority to speak of them (p. 19). Bṛhaspati's dictum that in cases where a rule is violated or what is forbidden is done, the king should take over the properties of the persons who do so, leaving them only bare means of subsistence and clothing, is explained by Lakṣmīdhara as not applicable to cases where local practices (*deśācāra*) permit them. The conventional practices of communities should be ascertained carefully, recorded and authenticated by the royal seal, so that they may be applied in cases concerning such conventions (p. 23) The practices are valid only in the areas in which they are followed and among those who follow them. The subject has been dealt with fully in *Gṛhasthakāṇḍa*, Introduction, pp. 22-24, and the corresponding portions of the Text.

Prāḍvivāka (Chief Justice)

If the king is unable, through pressure of other duties (*kāryāvasāt*) is unable to preside himself over a trial in court, he can delegate his duties to a *prāḍvivāka*, who will be the Chief Justice. The person chosen for the office must be a Brāhmaṇa, who has mastered the śāstras (*śāstrapāraga*). He should be well-born, mentally active and vigilant, impartial, incorruptible, of suave manners, good tempered, hard working and a believer in after-life (*Kātyāyana*, p. 25). The *Prāḍvivāka*, according to Bṛhaspati (p. 25) is so called because it is his function to interrogate the parties (*pṛcchati*) and he speaks sweetly to the parties. Truthfulness is among virtues the highest to be looked for in a Prāḍvivāka rules (Gautama, XIII, 31). Some smṛtis hold that when the king is himself presiding over the court of justice, he must have the chief justice (*prāḍvivāka*) to advise him, but the chief justice exercises in such a case only an advisory function. The chief justice should under no circumstance hold private talks with the parties to the suit—a rule which applies also to the assessors or puisne judges (*sabhyāḥ*) who should also be appointed to assist the chief justice. The number of the *sabhyas* is fixed by Manu at three as a minimum, but according to Bṛhaspati they may be five or even seven. Like the chief judge the *sabhyas* should be appointed by the king, and in qualities that they must possess they must be like the chief judge. But while the *prāḍvivāka* must be a Brāhamaṇa, the assessors can be Kṣatriyas or Vaiśyas, *if Brāhmaṇas are unavailable*, but they must possess the requisite qualifications. According to Viśvarūpa the functions of the assessors are only advisory and not administrative (II. 4). Justice is administered only by the king and in his absence by the chief judge.

Other Members of the Court

Without exercising judicial or administrative functions, certain others are required to be appointed in every court of justice. These are the herald who announces the decisions in the suits and proclaims its terms, the Accountant

(*ganaka*) who has to compute the exact amount of the claims, the Clerk of the Court (*Lekhaka*) who should write down the statements, and judgments that are delivered, and the Bailiff or Sādhyapāla; who should be a Śūdra, who has to serve the summons, and watch the parties and witnesses. Water should be kept in the court room for refreshment of parties and witnesses under examination, and fire and gold to be used, if necessary when ordeals are imposed.

Amicus Curiae

The chief judge and the puisne judges (*sabhyas*) are appointed to constitute the court. But learned Brāhmaṇas accompany the king into court, and though not appointed (*aniyukta*) they may be asked to give their opinions to the king or the judges on difficult problems of law that may arise during a trial. Such persons merely express opinions when asked to do so. Their duty ends there. Persons present in court who offer opinions and intervene in trials, without permission are punishable. Trials must be in open court. The private individual who offers his view, whether appointed to give it (*niyukta*) or volunteers it (*aniyukta*) must speak impartially (Nārada, p. 33). The members of the bench should speak what is right and decide justly, whether the king will follow their verdict or not (Kātyāyana, p. 34).

Smṛtis are full of admonitions to judges and to those who take part in trials to be just and impartial and avoid corrupt practices, by holding before them not only immediate punishment for bribery, but a bad future after death. The *sabhya* who sits silent in court, without expressing his views when wrong things are about to be done, must be held to share in the wrong. (p. 37). The *sabhya* should express his opinion only after careful consideration of the matter in dispute and under trial ; he is liable for punishment otherwise, both in this world and in the next. An unjust judge must be exiled (*nirvāsyaḥ*, p. 39). A judge who takes sides will have his whole property confiscated. (Viṣṇu, p. 39) Similarly a judge who does not take trouble to apply his mind critically to a case and errs through it is also punishable (Bṛhaspati. 1,76).

Pariṣad

When cases involving business transactions come up, the king (or chief judge) can convene assemblies (*pariṣad*) of merchants or business men of good families and standing, and of mature age to watch the proceedings and advise, when so asked. (Kātyāyana, 58-59). Association in trials of experts was common. Thus in *Mṛcchakaṭika* a chief *merchant* (*pura-śreṣṭhin*) and a member of the *kāyastha* caste (the Śreṣṭhin's Secretary) are associated with the judge in the trial of Cārudatta.

Kinds of Tribunals

According to Bṛhaspati courts of justice are of four kinds : an established

court (*pratiṣṭhitā*), in a fixed place or town, a circuit court ("moving", *apratiṣṭhitā*), a court constituted under royal warrant whose chief judge can use the royal seal (*mudritā*) and the court over which the king himself presides (*śāsitā*). The Court of Justice over which the king or *prāḍvivāka* presides should be in the fort within the capital (see *Rājadharmakāṇḍa*. p. 42). The Court sits on all days except the eighth, fourteenth and fifteenth *tithis*. Great stress is laid on employment of elderly persons as judges, assessors and as *amicus curiae* (p. 38), apparently to ensure learning, experience and sobriety of view.

Gradation of Courts

The chief court is the one on which the king or chief justice presides. But Nārada and Yājñavalkya (1,30) declare that suits may be tried in village courts (*kulāni*) courts of corporations (*śreṇi*) assemblages of people (*gaṇa, pūga*). The first three must have been like the later *pañcāyat* courts. The terms have been interpreted in different ways so as to bring almost all types of groups under one or other of them (See Medhātithi on Manu, VIII, 2). Kauṭilya makes a distinction between ordinary civil law courts, under which the various divisions named above will come, and criminal courts, styled *kanṭakaśodhana*, " means of removing thorns, " *i. e.* troubles to people in the way of crimes. In Dharmaśāstra the imposition of penalties for crimes is a function of the king. While the ordinary rule in civil cases is that the king should not initiate proceedings in court (Manu, VIII, 43), it is restricted to civil proceedings generally, and in the case of crimes the king *can* and *must* take the initiative (Aparārka, p. 605) The *Kauṭilīya* mentions two types of Courts: *Dharmasthīya* and *Kanṭakaśodhana*. Five out of the eighteen titles of law (*vivādapadas*) deal with criminal offences and trials under them must come before separate courts, and ultimately to the king for award or confirmation of sentences. The king has both police and magisterial duties. He uses either the ordinary police or secret service agents, (*stobhaka* or private detective or *sūcaka* or C. I. D. agent).

The judicial tribunals mentioned in *smṛtis* were thus of a representative character for most local cases. They included among judges not only persons learned in " law " (*smṛti*) but also persons having local, communal or professional knowledge and experience. The courts had thus an elasticity wanting in modern courts (Gururaja Rao, *Ancient Hindu Judicature*, p. 15). No trials are by a single judge ; even the king is assisted. A very high moral and legal responsibility is laid on all who try cases or help in them, and heavy punishments both secular and spiritual are indicated for those who error.

The Four Bases of Vyavahāra

On p. 41 occurs a citation of two verses of Nārada, which have caused a considerable amount of confusion in treatises on Hindu Law and Polity. The

two verses translated without bringing in preconceived ideas of royal power into it will run thus: "The four "feet" (*catuṣpāda*) of a *vyavahāra* (a case before the court) are *Dharma, Vyavahāra, Caritra* and *Rājaśāsana*, and among these each succeeding overrides those preceding. There, Dharma rests on Truth (*satya*), Vyavabāra on evidence (*sākṣiṣu*), *Caritra* (Custom) on records in book form, and *Rājaśāsana* on an order of the King." The same verses, with slight variation occur in Kauṭilya's *Arthaśāstra*, p. 150. Under this dictum, *Rājaśāsana*, if interpreted as it has been by some modern writers (like Dr. Jayaswal,[1] and Dr. Shama Sastri) as royal edict, it will imply that by fiat a king can over-rule customary usages, as well as Dharma, and that Nārada exalts the power of the king to absolutism. Dr. J. Jolly loosely translated the verses thus: "Virtue (*Dharma*) a judicial proceeding, documentary evidence and an edict from the king are the four feet of a lawsuit. There virtue is based on truth; a judicial proceeding (rests) on witnesses; documentary evidence (rests) on declarations reduced to writing; an edict (depends) on the pleasure of the king." (S. B. E., Vol. 33, p. 7). This loose translation has been outdone by Dr. Shama Sastri's version (*Arthaśāstra*, Eng. Trn. 1929, p. 170):—"Sacred law (*dharma*), evidence (*vyavahāra*), history (*caritra*) and the edicts of kings (*rājaśāsana*) are the four legs of Law. Of these four in order, the later is superior to the one previously named." It has already been noted that customs which contravene smṛti are invalid; and *caritra*, custom, as recorded by order of the king in books were like Sir Charles Tupper's *Punjab Customary Law* (1881) and R. A. Steele's *Law and Custom of the Hindu Castes in the Southern Maharatta Country*.

How greatly the translators have departed from accuracy will be seen if the terms are translated and interpreted correctly in accordance with the next verse and legal usage. The word *vyavahāra* (or *vivādārtha* to use the variant reading) only means "the subject matter of a suit". Its validity will thus depend, according to Dharmaśāstra, in the *descending* order on the king's (*i.e.* the court's) order (*rājaśāsanam*, as the king was also the chief judge), customary law, as recorded in books, (*caritram pustkaraaṇam*), the matter under trial (*vyavahāra*) as deposed by witnesses (*vyavhāraśca sākṣiṣu*) and Dharma, which is rooted in Truth (*satyasthito dharmaḥ*). In the view of those who have seen in these verses proof of regal absolutism, and power to legislate, like the Tudor Kings, by proclamation, the king can make or unmake laws by mere fiat, even if they contravene morality, religion and the ideals of life." A claim for absolute authority can go no further. Those who have given this interpretation overlook the fact that the very same authorities they rely on (*e.g.* Kauṭilya and Nārada) have declared unequivocally that where there is an

[1] *Manu and Yājñavalkya*, p. 74.

apparent discord between *Dharma* and *Nyāya* (Logic, reason) the latter must give way, and Kauṭilya's emphatic adjuration to the king to act in strict accord with Dharma (*yasmin arthe virudhyeta dharmeṇārtham viniścayet*, p. 150). The king is the mainstay of Dharma, and the means of its diffusion (*rājā dharmapravartakaḥ*, p. 150) by maintaining the enjoined duties of the four *varṇas* (*cāturvarṇāśramasya ācārarakṣaṇāt*). Dharma is of Divine origin, and it cannot be inequitable or illogical, and the injunction of Kauṭilya to apply logic and equity (*nyāya*) and of Bṛhaspati to apply intelligence (*yukti*) in interpretation of Dharma, which being Divine is infallible, are based on this hypothesis. The laws (*Dharmo rājakṛtaśca*) which has to be maintained by the King, according to Yājñavalkya (II, 186) must be such as are not in conflict with "true Dharma" (*nijadharmāvirodha*). The dictum of Manu (VII, 13) that orders that the king may pass occasionally to suit the moment, but without infringing true Dharma must be enforced is thus illustrated by Medhātithi: If the king orders that during the celebration of a marriage in the house of a minister or royal favourite (*iṣṭa*) the city should observe a festival, that all must appear on the occasion, or that no animals should be killed or birds snared on certain days, or that creditors should not arrest and detain debtors on certain days, his orders should be obeyed. It is noteworthy that such are the kinds of laws made by Aśoka, as evidenced by his Edicts. The injunction to the people to obey these orders is itself evidence of the king's authority and attitude to Dharma being under public scrutiny.

The verses in question have been interpreted by the *Smṛticandrikā* (*Vyavahārakāṇḍa*, ed. Mysore, pp. 23-24) thus. A *kṣatriya* has contacted the queen secretly, and when caught, he denies the offence through fear of death sentence and the witnesses he cites perjure themselves to save his life. Here there is a conflict of Dharma and *Vyavahāra* (resting on the evidence of witnesses). Again an *ābhīra*——(shepherd tribe) accuses a man of adultery with his wife, but by the recorded custom of Ābhīras' adultery by its women is no crime, and he defends himself by referring to his custom; here *caritra* (custom) overrules both *vyavahāra* (evidence in court) and Dharma. By an administrative order the King directs the house of a Brāhmaṇa, which is inviolable in Law, to be entered by his police in search of a criminal; here the king's order over-rides Dharma.

Mādhavācārya (*Parāśara-Mādhavīya*, ed. Islampurkar, III, pp. 18-19) gives another illustration to explain the rule. By the custom of Malabar adultery is no offence, while in ordinary law it is. A person caught in adultery with a Malabar woman pleads the custom in defence and is acquitted, in spite of evidence (*vyavahāraśca sākṣiṣu*); but if the king had ordered that in spite of the custom no adultery should be tolerated with Malabar women, his *śāsanam*

must be upheld and the offender punished. It is to enable local or communal usages to be explained, even when recorded, that local assessors are brought in trials before the Courts.

Rājaśāsanam may be translated as a decision of the king in a matter in dispute in which local usages and smṛti rules are cited on opposite sides and seem balanced; if, in such a case the king gives a decision, that will be the rule for the future in similar cases (*Parāśara-Mādhavīya*, III, p. 180). When there are no witnesses or documents, nor possession, and no scope for an ordeal, and there are no texts on local usage, the King must decide and his decision (*śāsanam*) will become binding in this case and similar ones in future.[1]

Rules for the Trial (Vicāravidhiḥ)

The Court should be located in a well-built house within the Fort, well supplied with water and shady trees. Its hall must have images or pictures of gods (*pratyālekhyadevatāḥ*): It should have water for refreshment of parties and a fire for use in ordeals. If the day is divided into eight parts, the time for the Court beginning is work in the second eighth *i. e.* from 7-30 A.M. The court may go on till noon.

Steps in Enquiry

The four steps in the enquiry are: the plaint (*pūrvapakṣa*); the defendant's reply (*uttara*); the Court's decision as to who should begin and on whom the burden of proof lies (*pratyākalita*); and evidence as proof (*kriyāpāda*). According to Nārada the first step is to record the plaint and the reply of the defendant (*āgama*) decide next the section of the law (*vyavahārapāda*) within which the matter will come, proceed with the investigation (*cikitsā*) and come to a decision (*nirṇaya.*) If the statement in the plaint is denied as untrue (*mithyokta*), the enquiry has four stages. So also in case of a special plea admitting the charge but qualifying it with a counter-claim, in such a way as not to go against the defendant (*pratyavaskandana*), and citing a previous decision (*prāṅ-nyāya*), but in case of the admission of the claim, it consists of only two stages (Bṛhaspati, p. 45).

Demeanour of Parties in Court.

It is disrespect to the Court if the parties come into it with dis-shevelled hair (*muktakeśī*), disshevelled clothing (*muktakaccha*), without the sacred thread worn as it should be (*anupavīta*), or without the second cloth worn above the body (*anuttarīya*), or sit down unpermitted by the Court, wear garlands, or hold up the left arm. These constitute discourtesy, or contempt of court.

[1] See my *Indian Cameralism*, 1949, pp. 103-110.

Judges' Consideration for Plaintiff or Parties

It is natural for litigants, who have to resort to courts for the first time to feel shy, or embarrassed or even to lose their mental balance or temper, when questioned. If the judges resent manifestations of temper from parties, the case will be affected. Manu (VIII, 312) advises the king (as a judge) always to forgive litigants who inveigh against him. But, an enraged party in a suit may often blurt out the truth in anger, and the Clerk of the Court is therefore enjoined to record what an angry party utters in anger (p. 48).

Commencement of the Suit.

When the party who wishes redress from Court comes into it in a humble manner, supplicating justice, the King (or Judge) should reassure him by asking: "What is your business? What is your grievance? Be not afraid! Speak out." (p. 47). He should also ask "By whom, in what way, when and for what reason were you injured?" (*ib.*). Whatever is given as a reply to these questions should be taken down in writing, after further questions and consideration along with the assessors, and the recorded statement should be attested by the seal of the King or Judge (p. 51). After making his complaint, the plaintiff should apply for some restraint to the defendant (to ensure his attendance when summoned later by the Court) but such restraint (*āsedha*) should not cause any physical injury to the person restrained (p. 52). The restraint applied (by the complainant or later by the Court) may be of four kinds:—compelling him not to leave a place (*sthānāsedha*), arrest for a short time (*kālakṛta*), inhibition from moving out (*pravāsa*) and restraint from activity of any kind till the debt is discharged (*karma*). But a plaintiff who places restraint on the other party without the sanction of the King (*i. e.* the Court) is punishable. The restraint is only pending the service of summons on the defendant. Arresting and detaining one who should not be is punishable. Restraint or arrest must not prevent the man so detained from exercising his limbs, or breathing freely or speaking. Restraint should not be applied in cases where it is impossible without injury to the person arrested (as one on horse-back or on an elephant), or where it will entail loss seriously, as arresting a cultivator when engaged in harvesting or sowing, or a soldier on the march or in battle (*sankhye*) or a sacrificer during the sacrifice (p. 54). Similarly, one who is about to be married in accordance with sacred rites (*śāstrodvāhodyata*), one who has begun the rite of gifts (*dānodyata*), artisans at their work, one engaged in pursuing a vow (*vratin*), a minor (*aprāptavyavahāra*), a royal messenger (*dūta*), and persons tormented by severe illness or calamities, are not to be placed under restraint (*Nārada*, I, 52-54). When through an order of the Court, the defendant is made to stay in his own house, he should not be taken into custody on account of another suit (*Kātyāyana*, p. 55).

These are also not to be sued or summoned, (*Vyāsa*, p. 55). Those who are construed as under the tutelage of their kinsmen, like a young woman in straits, or a woman recently confined, and maidens of a higher *varṇa* than the plaintiff, are not to be summoned. But in the case of women on whom the family depends, or who are without family, or are unchaste or of degraded condition, it is allowed (Compare *Civil Procedure Code*, section 132). He who, when summoned, fails to appear will be fined according to the gravity of the suit.

Security for Appearance (Pratibhū).

In order to ensure the attendance of the plaintiff, after he has made his complaint and statement, and the defendant, after he has been summoned, sureties or security for attendance have to be furnished by them (*Yājñavalkya*, II, 10). If a plaintiff, with an apparently good case, is not able to furnish the security for his appearance, he should be kept under watch in court, and the warders who keep watch over him should be remunerated by him at the end of the day (p. 57). The servant of the Court who serves its summons (*dūta*), should be paid the cost of his food, sufficient for the guard. (p. 57). A second summons should be served on a defendant in case the area he lives in is in the possession of an enemy, or is under famine, or is afflicted by epidemic (*vyādhipīḍita*), and his failure to attend on the first summons must be excused (p. 56). The surety is also for the purpose of ensuring that the decree of the Court is made effective. If either party is unable to afford a surety, he must remain in custody under a court official (*sādhyapāla*). No one is to be accepted as a surety whose antecedents and capacity to stand as such are not known to the Court, or one who may not be able to pay the amount decreed if the party proves unable to do so (*Kātyāyana*, 114-116). Kātyāyana (120) provides for the appointment by the Court of a receiver, who will hand it over ultimately to the successful litigant.

Arrest before Judgment

The provisions about *āsedha* are analogous to those about arrest before judgment in Civil Procedure Code, Sec. 94. (Order XXXVIII)

Plaint (Pakṣa, Bhāṣā, Pratijñā)

When the defendant comes before the Court the statement originally made by the complainant (plaintiff) is written down accurately in their presence (Yajn. II, 6). In the second recording all details must be brought in by the plaintiff. The plaintiff is also termed *arthin* (one who prays to the court for help) and *abhiyoktṛ* (attacker) as he attacks the defendant. The latter is termed *prativādin*, *pratyarthin* and *abhiyukta*. After the defendant comes into court, the plaintiff may alter or amend his original statement and finalise it. He can

amend his plaint till the reply of the defendant is filed (*Nārada*, II, 7). A plaint which omits essential details like dates, location and value of the object claimed and its dimensions is inadmissible (*Kāt.* 138) A plaint is vitiated by contradictory statements and will fail (*Bṛhaspati*, p. 61). If the plaintiff through timidity is unable to complete his case, he may be given time to do so (p. 62), and Nārada limits the time to a week. The plaintiff's statement should be written on a board or on paper. (The rules are similar to those of the Civil Procedure Code, Order VII, rules 1-5).

A plaint which omits to furnish essential details (*e.g.* time and place of cause of action, the material or *dravya* in dispute and its amount), and one which mixes up several *vyavahārapadas*, or contains manifestly imaginary claims, or is self-contradictory must fail, as also one opposed to the usages of the country (*Kāt.* 136). A plaint making a claim for a trifle is to be rejected, according to Bṛhaspati, as it will only waste the Court's time.

Interdicted Litigation

A case involving a dispute between a *guru* and his disciple, a father and his son or sons, between husband and wife (*dampatī*) and master and servant (*svāmi-bhṛtyaka*) should not be allowed. Lakṣmīdhara (p. 51) explains that after the judges (*sabhyāḥ*) obtain in such cases the plaintiff's statement and that of the defendant, and hear them, they should not proceed with the case but endeavour to clear up the matter and calm the disputants (p. 51). The *Mitākṣarā* (II, 32) takes a similar stand, holding that as no good will result in this world or the next by proceeding with such disputes, the pupils and others should be induced by the court to give up the case, but if the parties press the matter, the suit should be proceeded with and decided on its merits. Jīmūtavāhana (*Vyavahāramātṛkā*, p. 285) takes a firmer stand. He states: "This refers only to small matters (*alpāparādhaviṣayam*). If the teacher inflicts an improper punishment (*anucitadaṇḍa*) on the pupil, or the father through infatuation wishes to give away his entire property (*sarvasva*) to a prostitute or a *kirāta*, or desires to sell away an only son or give him away (in adoption) or a husband wishes to sell away his chaste wife or a hereditary servitor—such disputes *must* be looked into (*dṛṣṭavya eva*), and the appropriate action or punishment awarded by the Court". He cites passages showing that the wife has absolute property over her *strīdhana* and if the wife or son errs they must be lightly punished. A legal proceeding by these is therefore lawful. Nārada holds that disputes between husband and wife should be settled by relations, and not by courts of law.

Priority in dealing with Cases

Manu (VIII, 24) lays down that suits are to be taken in the order of the *varṇa* of the complainants, the Brāhmaṇa's being heard first, and so on. This is

merely recognition of the religious commitments of the Brāhmaṇa and of the others rather than partiality. Again, when suits of different importance are brought in, those which are most important should be taken up first, according to Medhātithi. Serious cases of violence, theft, assault and defamation and cases *relating* to women (' *against* women ', according to Viśvarūpa) should be heard atonce, and the defendant must be made to answer the charges immediately. (Yājñavalkya, II, 12, p. 66)

Time for Defence or Answer (Uttaram)

When the value of the thing in dispute will deteriorate, or there will be the risk of its destruction or loss, the matter should be treated as urgent. Kātyāyana holds that in disputes concerning cattle, fields, women, marriage, deposit, loans (for use), purchase and sale, theft, quarrels (*pāruṣya*) acts of violence and charges of grave sins the defendant should be made to give his reply immediately. (p. 67). Ordinarily, if the defendant does not give his rejoinder within a week, he loses the case (Kātyāyana), but Manu (VIII, 58) allows 45 days for the rejoinder to be made. The time should be granted only when applied for (*yāceta*, p. 64). The time granted will depend ordinarily on the interval between the filing of the suit and the transaction, and the maximum time is one year (p. 65), which can be given also when the defendant is an idiot, or lunatic or is seriously ill or has gone to a foreign land and his address is unknown, as are also relevant witnesses (p. 66) Gautama. (XIII, 28) states that if the defendant is unable to give an immediate reply, the judge may wait even for a year, but, as pointed out by Medhatithi, this is the extreme limit, and should not be ordinarily allowed. Postponement, at the discretion of the Court, may be granted in complicated cases. When such time is allowed in cases of debts, pledges, gifts, deposits and inheritance, due security must be obtained before time is given for the reply (Pitāmaha in *Parāśara Mādhavīya*).

Answer or Defence (Uttaram)

A plaintiff's reply to the contention of a defendant is replication, and the defendant's reply to the plaintiff's replication is a ' rejoinder '. According to Bṛhaspati (p. 68) the reply is of four kinds: (1) denial (*mithyā*) ; (2) admission (*satya* or *sampratipatti*) ; (3) counter-claim or special plea for demurer (*kāraṇa* or *pratyavaskandana*) ; or (4) plea of *res judicata* or former decision (*prāṅ-nyāya*). Lakṣmīdhara cites from Bṛhaspati, Kātyāyana and Vyāsa detailed descriptions of faults in a rejoinder (pp. 68-74). The treatment is exhaustive. Everything is aimed at minimising delay in the disposal of the suit. This is a special merit of Hindu judicature.

Representative or Agent of Defendant (pratinidhi, prativādi)

When a person is offered as his consenting representative by the defen-

dant, he should be treated as if he was the party, and be allowed to act for his principal, but the victory or defeat is the latter's and not that of the agent. But an agent will not be allowed in cases of brahmanicide, drinking wine, theft, incest and other grave offences like sedition, counterfeiting coins and violent assault (p. 75). The agent is like a priest in a religious ceremony acting for a principal. The natural agents are brothers, father or son. The intervention of others than the constitued agent is punishable (p. 75).

Defeat in the Suit (*Hīna*).

Apart from the results of the investigation and trial, which have to be carried, a party may be regarded as defeated in certain circumstances. Thus, according to Manu (VIII. 53-58), the plaintiff who cites a witness who was not present at the transaction, or who retracts the statement of his case, or makes confused and contradictory statements, or shifts his ground, or who does not stand by his own assertions, or who tampers with a witness, or refuses to answer questions put to him by the judge, and who does not establish his case, is to be regarded as ' defeated, ' (*hīna*) *i.e.* as having lost his case. If a plaintiff refuses to answer questions put to him by the Court, he will be fined. The same is the case with a defendant also, but a limit of three weeks is allowed him to give his answer to the plaint. (p. 82). Nārada regards the losers of a suit as of four kinds: those who abscond after being summoned by the Court, or who keep silent in Court, or who are convicted of falsehood in Court or one who admits the case against him (*i.e.* confesses). Nārada adds to the list of losers in a suit those who give up their original claims and put forward new ones, not mentioned in the original complaint (p. 81). Yājñavalkya (II, 16) adds to the number he who endeavours to press his claim without proof. Kātyāyana adds to the number the person who having made a charge backs out of it later (p. 82). A verbal error (*vākcchala*) does not vitiate an act, (Nārada, p. 83), in matters relating to women, landed property, cows and debts. The error has to be paid for by a fine, but the suit will not be lost.

Compromise (*Sandhi*)

After the defendant has filed his answer (*uttaram*) and the parties have joined issue in Court, they should not compromise the suit privately without the sanction of the Court. Such a compounding will be like the union of iron pieces by fusion. But it may be necessary if the evidence on both sides is balanced, and the uncertainty of the decision, owing to differences between usage and smṛti will make a compromise desirable. It is for the courts to encourage such compromises, says Bṛhaspati (p. 85) as disputes engender hatred among men, and heads of society should endeavour to stifle such growth of illwill. The courts are advised to help the trend to compromise. But a compromise entered into behind the back of the Court is punishable, with double the court costs

on each side. In modern Indian Law too this position exists (See *Civil Procedure Code*, sec. 445, Order XXIII, and Criminal Procedure Code on compounding of offences). Both parties may have been wrong-doers and would not escape judicial castigation, if the suit was proceeded with. It is the idea that such moral restraint will be evaded that is behind the penalty advised for unauthorised compounding. Kātyāyana deems such arrangements as deceiving the King.

Court Fees (*Bhṛti*)

In criminal cases no fees had to be paid by the complainant, and fines imposed are among the penalties on the convicted. No fees are to be paid at the inception of the suit by either party. When the suit is decided, each party has to pay 5% of the value of the suit, and the extra 5% to be paid by the unsuccessful defendant is the penalty for needless litigation, and has to be treated as a fine, if he had denied his liability and necessitated the enquiry in Court (Manu, VIII, 139). Besides its lowness as compared with the heavy court fees, of a progressive nature, rising in amount with the value of the suit, its collection at the end of the suit makes it possible for a poor man who has no resources and has been deprived of them by his opponent, whom he has to sue, to start the suit. It is not so now. Taken along with the provision to prevent unnecessary delays in hearing the suits and deciding them, the old smṛti law was fairer to litigants than modern Indian law.

Production of Evidence of Proof (Kriyādānam)

Even the plaint becomes a *replicatio* or rejoinder (*uttaram*) when the defendant raises in his reply a counter claim. In such a case, the plaintiff has to add proofs to establish his claim (Kātyāyana). The plaintiff must produce further evidence to support his claim, *e. g.* in a suit for the repayment of a debt, if the defendant while admitting puts forward a counter claim, by citing witnesses who were present when the loan was contracted. If two persons quarrel, and if both cite witnesses, the witnesses of the party who first goes to the Court shall be heard first. When the plaintiff's case shows weakness (*ādharya*), the witnesses of the defendant should be heard first. When the defendant has met the plaint by a counter claim, he takes priority and has to prove his assertion first. (p. 88). If the reply is denial the burden of proof is on the plaintiff. If the reply claims to rest on a former judgment or on a special plea, the burden of proof lies on the defendant. If the reply admits the claim no question of burden of proof arises. When the defendant denies the claim *in toto*, and by evidence the plaintiff partly establishes it the judge can decree the whole claim.

Classes of Proofs

Bṛhaspati (p. 91) classes them as two—human and divine. Human proofs

are witnesses (*sākṣiṇaḥ*), documents (*lekhya*) and inference (*anumāna*), Kātyāyana adds *bhukti* or enjoyment or user as a fourth kind of proof. *Yukti* (reasoning) is used as a synonym for *anumāna*, as inference is by reasoning. In certain cases like a right of way, ownership of water courses, enjoyment is a more powerful proof than documents or witnesses. Ordeal is divine proof. Ordeals are recommended in the case of heinous offences (*sāhasa*) along with witnesses: so also in cases of abuse, defamation and injury. In cases of treason (*nṛpadroha*) ordeals are recommended in preference to evidence, as obviously it will be difficult to get the latter. So also in regard to cases involving the character of women (p. 95). In regard to acts done secretly, in which witnesses are obviously unavailable, ordeals are necessary. Secret offences may be dealt with by study of manifest signs and demeanour as well as by ordeals. In regard to acts done long ago, for which living testimony is unavailable, ordeals may be used in preference to witnesses. Even when witnesses are available, ordeals are preferred (1) when the evidence on both sides is equally balanced, making it difficult to decide, and (2) when the offence being investigated is one involving death penalty (p. 96). If the authenticity of a relevant document (*lekhya*) is denied, recourse must be to ordeals. So also if the document is declared to be forged. (p. 97). Bṛhaspati and Kātyāyana favor a wider use of ordeals, as in cases of misappropriation, fabrication of pearls, gems and corals, withholding a deposit or adultery. The use of ordeals is prohibited in disputes relating to landed property and of libel and slander.

Witnesses (Sākṣiṇaḥ)

Witnesses are grouped in eleven classes by Nārada and into twelve by Bṛhaspati. They are grouped as 'appointed' (*kṛta*) and 'unappointed' (*akṛta*). The former are of five kinds and the latter of six (Nārada). Under the first class come an attestor who is cited as witness (*likhita*), one who has to be reminded of the act (*smārita*), a casual witness (*yadṛcchābhijña*), a secret or hidden witness (*gūḍha*) and an 'indirect' witness (*uttarasākṣin*) and a family witness (*kulya*). Bṛhaspati adds to this category the person who caused the writing (*lekhita*). Under the 'unappointed' category come co-villagers, the judge, the king, one acquainted with the affairs of both parties, one deputed by the claimant. When a trial is conducted by the king (as on an appeal) the scribe (clerk of the court), the judge and the puisne judges (*sabhyāḥ*) may be witnesses (p. 101). When a case of theft or assault within a village is being dealt with, a villager is a good witness, even if uncited. A person, not cited but who has actually heard or seen, is admissible as a witness (Manu, VIII, 76). The *uttaraśākṣin*, who corroborates the testimony of others from his own knowledge, is hardly an indirect witness, according to Dr. Kane (*Vyavahāramayūkha*, Notes, p. 66). Jīmūtavāhana cites a verse of Vyāsa to show that as regards

what took place in his own presence as a judge, none can be a better witness than the king. Dr. Amareshwar Thakur (*Hindu Law of Evidence*, 1933, p. 20) points out that acceptance of *akṛta* witnesses is due to the necessity for testimony and some circumstantial guarantee of reliability.

The testimony of an attestor (*likhita*) is valid even after the lapse of time.) p. 103). If he is unable to identify his own signature, after the lapse of time, the genuineness of the signature may be established by comparison with other signatures of his (Kātyāyana, p. 104). Testimony rests on memory. Arbitrary rules of the duration of the period, during which such memory is allowable—, *e. g.* of a deposing witness upto seven years, of a casual witness for five years, a secret witness upto the third year and an indirect witness upto a year—may be deemed merely recommendatory, for as Nārada owns (p. 104) the evidence of a man of good memory, with undamaged faculties, will be valid even after a very long period.

Indirect Testimony

Manu lays down (p. 98) that evidence in accordance with what has been actually seen or heard is alone admissible (VIII, 74). A *sākṣin*, according to Nārada is one who has actually *seen* with his own eyes. This is in accordance with the modern rule of preference of direct knowledge. Medhātithi holds that Manu's rule is against indirect or hearsay evidence, This is so today too. But secondary evidence may be accepted in certain circumstances : the death of the appointed witness or his having gone to a distant place, which makes his presence in court impossible, or the appointed witness dies but there are persons who have heard his statements on the matter in dispute. Accordingly, Viṣṇu (VIII, 12) rules that an appointed witness having died abroad, those who have heard his depositions may give evidence. This is in accordance with modern practice.

Circumstantial Evidence (Yukti)

Yukti may be taken as circumstantial evidence from which an inference, warranted by reasoning, may be drawn. Bṛhaspati has a famous dictum that there is loss of Dharma in a trial devoid of the application of *yukti* (*yuktihīna-vicāre tu dharmahāniḥ prajāyate*). Śankhalikhita state that " an adulterer is proved to be such by being caught playing with a woman's hair, when she is another's wife, an incendiary by being caught with firebrand in his hand, near a house on fire, a murderer by being caught near a murdered man, and a thief when found in possession of some of the stolen articles." Such presumptions are noticed in the *Indian Evidence Act*, sec. 114. The famous story of Māṇḍavya, which is cited in smṛtis, is an instance, often given, of the risk of coming to conclusions by apparent signs, or circumstantial evidence alone, when not critically weighed. In such cases Nārada (IV, 289) and Manu (VIII, 114)

provide for special oaths (*śapatha*) to clear up suspicions arising from circumstances.

Evidence on Commission

When it is impossible to bring into court a witness who is in a foreign land, his testimony may be recorded by Vedic scholars (*traividyāprahita*) and the record may be accepted by the court. This corresponds to evidence taken on commission provided by the Indian Evidence Act and the Civil Procedure Code, 485, order XXVI.

Testimony of a Solitary Witness

Gautama rules that the witnesses should be many (p. 105) and trustworthy, and might be even Śudras. Yājñavalkyá (II, 68-69) describes persons of austere life and learning as competent witnesses, but even they should at least be three in number (p. 105). Manu (VIII, 60) rules that a suit may be decreed against the testimony of *three* witnesses (p. 102). Bṛhaspati rules (p. 102) that the witnesses may go up in number from three to nine even, but a single witness should not be accepted for examination (*na pṛcchet kadācana*). Kullūka explains Manu, VIII, 66, barring a solitary witness, as due to the fear of the solitary witness dying or going abroad, and thereby frustrating a decision (*naiko vināśapravāsaśaṅkayā*). But a sole witness is allowed when both parties agree to it, and the witness is a person of undoubtedly high character.

Other instances of the admissibility of a single witness are, (1) if he alone was taken into confidence when a deposit was made (in such a case alone), or (2) is one sent by the litigant, or (3) is a jeweller who alone is competent to identify jewels.

Witnesses have to be men of character, and preferably of the first *varṇa*, and devoted to its religious duties. They must be known for their impartiality and rectitude. They must belong, if possible, to the same group as the parties (*śreṇi*), and, in the case of suits or cases involving women, women witnesses should be preferred (p. 107). For litigants of the first three *varṇas*, witnesses should preferably be of the same *varṇa*. or of groups (*varga*) of the same group. Śūdras of good character should be accepted in cases involving others as well as Śūdras (p. 107).

Disqualified Witnesses (*Asākṣiṇaḥ*)

The smṛtis give long lists of persons who should not be witnesses. It may be presumed that the rules are only recommendatory in most cases, or indicative of the inherent defects in the witness. According to Nārada inadmissibility to be taken as witness may spring from (1) a rule of smṛti, (2) or lack of character in the witness, or (3) contradiction, or (4) bad disposition or (5) intervening desease. (p. 108).

In the first group come persons who have renounced the world, or have no interest in worldly affairs or are unlikely to watch them, infants (*śiśu*), insane persons or drunkards (habitual), or rakes, outcastes, adulterers, persons who live by prostituting their women, and atheists. Exclusion on the ground of inconsistency in statements of the witness, can arise only after the hearing. It is a case for rejection of testimony, and not for rejection of summoning, unless of previous conviction for such an offence. Persons of manifest bad character (*dṛṣṭadoṣa*) are excluded. An interested party is to be excluded, if he has an interest in the suit. An abettor (*sahāyin*) or accomplice is also to be excluded, *i. e.* his testimony is to be rejected. The idea is apparently to reject the unhesitating acceptance of the testimony of relations and interested persons, not their rejection as witnesses. The ground of exclusion (or suspicion) is common interest between witness and party. Manu will allow a relation (*bandhu*) on failure of other witnesses (VIII, 70). An enemy (*ripu*) is excluded on manifest suspicion. Born slaves or dependant labourers are also excluded. Incompetency on account of want of reasoning faculty arises in "infants" (*śiśu*). In modern practice even the testimony of a child, which shows intelligence, though only eight or nine years of age, is allowed. A person of senile age (*vṛddha*) is excluded similarly. Persons with deficient limbs or suffering from incurable disease or eunuchs are excluded because of their faculties of perception being defective, or because their defects are the results of their bad *karma* in past births (Manu, XI, 49-52). Persons who are deficient from a religious standpoint are excluded, as obviously the oaths that are administered to such witnesses cannot be felt by them to be binding. The exclusion of women from being witnesses is on the presumption of ficklemindedness in them. But Manu's acceptance of them in cases where women are concerned will show that this cannot be the real ground. Medhātithi (VIII, 68) explains that the rule of exclusion of women from being witnesses applies to cases where both parties are *men*. When the suit is between two women or between a man and a woman, the exclusion disappears. The admissibility of women to testify on failure of qualified witnesses is explained by Medhātithi as implying that they are competent to testify in cases which are recent, as there has been no interval of time in which their minds might waver !

There are over a score of exclusions on account of low birth or professions. Exclusion, as a kind of privilege, is instanced by that of the king and royal officers or of *śrotriyas*, who must be constantly engaged in religious duties. The exclusion is not an indication, as pointed out by Medhātithi (VIII, 65), of their want of credibility, but to save them from being taken away from important religious duties. One who volunteers evidence is not to be accepted (p. 114)

A witness summoned by one party should not be asked by his opponent to testify (*Kātyāyana*, p. 116).

Witnesses barred on specific rules will still be admissible in cases involving grave crimes (p. 118).

Priority among Winesses, its determination

The relative value of evidence of witnesses of the different classes does not arise in cases of violence, assault, theft and defamation, and the competence of those who give such evidence should not be scrutinised too closely (Manu, VIII, 72). Kātyāyana adds transgression of the king's commands to this list, along with complaints in regard to what took place within a house, at night, or outside the village. In cases of violence those who are ordinarily barred from giving testimony, like slaves, the blind and the deaf and lepers, are examinable (p. 118). The underlying idea is that if one insisted on *absolute* acceptability in a witness, it may be difficult in some cases to get any evidence at all. But Nārada (p. 118) would still exclude from giving evidence children (because they might speak falsely through ignorance), relations (as they might depose falsely from affection), an enemy (as he might depose falsely from the desire of revenge) and women (because of habitual untruthfulness !). Manu (VIII, 77) ascribes the exclusion of women in evidence to their fickleness. But there is no exclusion of women from giving evidence altogether, as they are permitted in suits in which both parties, or one of the parties is a woman (Manu, VIII, 68). Manu would reject the evidence of men who are very senile, or are of depraved mind or are diseased.

Rejection of Testimony of Witness

The rule is that any disqualification of a witness that would make him unfit to give evidence should be stated openly in Court by the party objecting, and at the very beginning. The challenge should not be after deposition has begun. A false or malicious attack on witnesses makes the attacker punishable (p. 120). Vyāsa rules that the defects of a witness should be stated in open court, and in writing, and the Court must ask the witness to refute them or stand aside, but if the witness protests his innocence, the challenger must be asked to substantiate his statement impugning the witness.

Examination of Witnesses (Sākṣiśrāvaṇam)

The smṛtis insist on the examination of witnesses and hearing them with as little delay as possible (p. 126). Witnesses should be put on oath (*śapatha*) after being called up, and then closely examined, one after another. The deposition must be in the presence of *both* parties in certain cases, the depositions should ordinarily be taken near the objects in dispute, *e.g.* cattle, bipeds, or immovable property (p. 123), but witnesses can be made to depose even in the absence of things to be weighed, or counted or measured.

The examination should be in the morning, and after both judges and

witnesses have purified themselves (by baths etc.). The examination should take place before images of gods and in the presence of Brāhmaṇas. Elaborate exhortations to witnesses, appealing to them to speak the truth, the whole truth and nothing but the truth, and pointing out to them the spiritual merits of speaking the truth and the danger of sinning by false testimony are given in Smṛtis. 'The perjurer commits the same sin as as the incendiary, the slayer of children and women, warns the judge' (Yājñavalkya, p. 125).[1] All merit acquired from birth will, it must be exhorted, be lost by speaking falsely. The guilty judge, the guilty witness and the killer of a Brāhmaṇa are equals in sin. By telling the truth, the witness must be warned, he attains fame in this life and beatitude after death (p. 122). Truth is greater as a conferrer of merit than a thousand horse-sacrifices (*aśvamedha*)—A perjuer, adds the exhortation, suffers the pangs of a discarded wife. Truth is the stairway to Heaven (*svargasya sopānam*, p. 127). Truth is better than a hundred sons. One who speaks truth attains godhood even in this life (p. 128). Generations of deceased ancestors are ruined by the false deposition of a descendant (Baudhāyana, p. 129).

Such exhortations will be effective only on believers in Dharma. The exclusion from being witnesses of agnostics (those who have no faith in religion), atheists, and apostates will be intelligible from this type of exhortation. The exhortation is made along with imprecations. The oath (*śapatha*), which is described in detail in smṛtis (*inf.* pp. 131-135), will be ineffective on those who do not believe in Dharma and *Karma*. All the merit (*sukṛta*) that a virtuous man acquires will be lost by speaking falsely, or defeating unjustly an adversary in a suit (Yājñavalkya, p. 135). So will it be ineffective too in persons of high birth (Brahamaṇāḥ) who take to ways of life condemned for their varṇa. (p. 135).

Manner of Testifying (pp. 136-137).

The witness should testify in a reverential manner. He should lay aside his head-dress, touch gold and cow's urine (*gomaya*) as a purification, and speak lifting up his right arm. In cases of manslaughter he should depose before an image of Śiva (*vādayet Śivasannidhau*, p. 136). He should not answer when he is not questioned. An unsummoned or uninterrogated witness should not depose (p. 137). When the deposition is made in a natural way, the witness should not be harassed by being questioned again and again.[2] The witness should speak of only what he himself has seen or heard (Baudhāyana, p. 137). That way will win trust.

Evaluation of Witness (p. 138)

The king (or in his absence the Chief Judge) should himself question the

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[1] All such references are from Vyavahārakāṇḍa, published in G. O. S. Vol. CXIX.

[2] This is a virtual interdiction of cross examination.

witness in open court, but weigh the evidence subsequently along with the puisne judges (*sabhyāḥ*). Attention should be paid to the tone and manner of the deposition by the witness in evaluating the testimony. When the witness appears restless, shifts his position, licks the corners of his lips, loses color, perspires in the face, coughs and heaves often, scratches the ground with his toes, becomes dry-mouthed, falters in speech, speaks incoherently, is voluble and silent by fits, and will not meet the eyes of the questioning judge, he may be regarded as perjuring. But these are, as warned by Medhātithi (VIII 126) not proofs of dishonesty. Such symptoms may be displayed even by truthful and nervous witnesses unaccustomed to appear before courts, and they must be deemed only as needing observation for subsequent consideration by the judges. As witnesses are likely to become nervous if the King or chief judge shows anger, these are warned not to lose their temper, and to regard such signs as often natural to some persons.

Allowable Perjury (*Satyāpavādaḥ*)

Falsehood is " permissible " in testimony when truth speaking bring death to one of the parties. " By truth are witnesses purified; and so are they when they depose falsely to save the life of persons " (*Viṣṇu*). Speaking falsely from a pious motive does not make a witness who speaks so lose Heaven. (p. 146). Gautama, who adheres to this rule, modifies it by adding that speaking the truth in cases of confirmed and heinous offenders will not be sin (p. 146). But a sin *is* a sin, even if committed for pious motives and must be expiated. The expiations advised by Viṣṇu, Yājñavalkya and Manu in such cases are repeated by Lakṣmīdhara (p. 147). The *Mahābhārata* allows in a famous passage, lying in five cases.

Strength of Evidence (*Sākṣi-balatvam*)

The rule advised is that the evidence of a majority of witnesses should be accepted as truth but if the number testifying on both sides is equal, the decision should then go by observation of the demeanour and good qualities (birth etc.) of the witnesses, and where the good qualities are balanced, by the side for which Brāhmaṇas have testified. When numbers are equal on both sides, as regards witnesses, the side which has more virtuous men as witnesses should win. If, after the plaintiff has established his contention or case by a number of witnesses, the defendant produces more and better witnesses, the former loses his suit (Kātyāyana, p. 149). Among witnesses quality is to be preferred to mere number (Yājñavalkya II, 72).

Evidence of witnesses becomes worthless in some cases. Inconsistent statements by a witness, conflict of evidence as to time, place, age, matter, quantity, shape and species makes the evidence worthless. If in a suit for money

debt, the witnesses contradict one another as regards the amount their testimony is worthless.

Punishment for False Testimony (Sākṣidaṇḍaḥ)

A witness who says first one thing and later says what is contradictory to his first statement should be punished for deceptian (Kātyāyana, p. 141). Manu ascribes several obvious causes for false evidence: *e.g.* covetousness, distraction of mind, fear, friendship, lust, anger, ignorance and immaturity of mind (VIII, 118). He prescribes graded punishments according to the apparent cause of the falsehood in testimony. These range from the lowest amercement in cases of lying through nervousness, two middle amercements if it is due to fear, and four times the lowest amercement if it is through friendship, and ten times of it if it is done through lust, three times the second amercement if it is due to wrath, two hundred *paṇas* if it is due to ignorance and a hundred if it is due to puerility (VIII, 121). The severity of the penalties is explained as designed to prevent a failure of justice and in order to restrain injustice (VIII, 122). Banishment, in addition to a fine, may be the penalty for perjury by Non-Brāhmaṇas but exile alone is the punishment for a Brāhmaṇa perjurer. (*Ib.* 123). Viṣṇu would, in addition to banishment, impose the confiscation of entire property as the penalty for perjury (p. 142). A witness who knows the facts but stands mute when questioned, deserves the same penalty as a perjurer (Viṣṇu, p. 143), and one who refuses to testify shall be fined ten per cent of the value of the property in dispute (Kātyāyana, p. 143). Delaying evidence for three fortnights is punished by a fine of ten per cent of the value of the property in dispute (Manu, VIII, 107), and Kātyāyana would punish the witness who, knowing the facts, will still not testify, with a fine equal to the value of the property in dispute. The hand of God is seen when a perjurer suffers from disease or a fire accident within a week of his deposition (p. 143).

Documents (*Līkhita*).

Even within six months, declares Bṛhaspati (p. 152), doubts about facts will rise in human mind. It is to avoid them that the Creator has invented Documents. Marīci (p. 152) affirms that the genuineness of gifts, or sales of landed property is not provable unless the acts have been recorded in documents.

A document needs attestation, which may be of different kinds. Viṣṇu divides them into three classes from this standpoint: those written before the King (*i. e.* before an official who attests them, like the modern Registrar of Assurances); those bearing the signatures of witnesses ; and those that have no such superscription. Nārada (IV, 135) clases them as (1) those written in the hand of the executant himself and (2) those written by another's hand. The

second alone needs attestation. Documents again may be public (*rājakīya*) and private (*jānapadīya*); and the latter may be written in his own hand by the executant and or may be written by a scribe or another person. The *Mitākṣarā* (II, 22) calls the *rājakīya* document *śāsana*, and the other *cīraka*. The *jānapada* documents are of different kinds: deeds of partition (*vibhāga-patra*), deed of gift (*dānapatra*), sale deed (*kriyāpatra*), mortgage deed (*ādhipatra*), deed of convention by villagers (*samvitpatra*), deed of bondage (*dāsapatra*), deed of debt (*ṛṇalekha*), deed of purification (*viśuddhipatra*) attested by those present at the purification for sin, compromise deed (*sandhipatra*), deed defining boundaries (*sīmāpatra*) submortgage deed (*anvādhipatra*) and *upagata* (receipt). A document attested by an accountant or state official is regarded as if it was attested by the King himself (Viṣṇu, p. 153). A state document is signed by the King or bears his seal (*mudrā*).

The classifications are not exhaustive. The royal deed is said to be superior (in authenticity). The royal deed is said to be superior (in authenticity) to the *jānapada*, the *jānapada* to *svahasta* attested by witnesses and the last to a *svahasta* which is unattested by witnesses.

Two witnesses were usually regarded as sufficient for attestation. Full details regarding dates, places, residence, parentage etc. should be furnished in document.

Grant of Decree (*Śāsana*)

A royal grant has to be engraved on a copper plate, and written by the Sāndhivigrahīka. It should mention place, family lineage, place, village to be donated, and declared valid in regard to the gifts as long as the Moon and the Sun last (p. 157). When a king makes a gift of a village or land all these details should be given in the copper plate, which must have the royal seal also. The terms of the gift should be indicated in it.

The document which records the decree of the Court, after an enquiry, is called *jayapatra* or *paścātkāra* (p. 160). It should give a resume of the enquiry, and the statements of plaintiff and defendant, evidence and the decision of the court fully (*Kātyāyana*, p. 160). The king of chief judge, and the other judges should sign the document.

Valid Documents (*Sallekhya*)

A document is valid if it is duly attested, after being legibly written and in clear language, following local usage as to documents, and if it gives all details that are necessary fully (p. 261).

A document which is declared invalid should be annulled at once. If it is not done, and it is allowed to remain, it has validity. When a document is

lost, or damaged or is illegible or torn or burnt, a fresh document must be made (p. 262). The fresh document may be written in his own hand by the party.

Invalid Documents (Duṣṭalekhya)

Documents executed by a dying person, by children, by frightened or desperate persons, by women, by intoxicated, mad or grief stricken persons, or executed at night or by force are deemed invalid (p. 263). A document recording a loan held by a creditor, which is however unattested, is void unless the creditor proves the debt otherwise. A document opposed to local usage, which is ambiguous and incomplete in the specification of matters and is executed by one who is not the owner, is also invalid (Kātyāyana, p. 164). A document spoilt by fire, or executed long ago, or dirtied and illegible, or which contains mutilated or effaced syllables, or is for a brief period only may be declared invalid (p. 164). A deed in which the lines are irregular, is in ambiguous wording and which does not possess the characteristics of a genuine document is invalid (p. 264).

Testing Genuineness of Documents that are suspect

A document bearing the royal seal must be accepted as genuine (Prajāpati, 168). If a document is in the hands of one who is not the owner, its coming into his hands must be investigated (Vyāsa, p. 167). Careful scrutiny of a document, whose authenticity is doubted, is necessary by comparing its writing with that of the alleged writer, and noting any peculiarities in its wording or tenor (Nārada, p. 167). Vyāsa warns us against accepting the authenticity of a document from its apparently genuine writing as clever forgers fabricate documents that look genuine (p. 166). Dishonest relations try to cheat women and children and illiterate persons by fabricated documents (Bṛhaspati, p. 166). When the witnesses, scribe, creditor and debtor of a document are all dead, there is reason to suspect its genuineness, says Nārada. (IV. 138.)

Strength of a Document (Lekhyabalam)

In order to combat possible challenges in future of the genuineness of a deed, Bṛhaspati advises its owner to exhibit and read it in assembled family groups, meetings of traders and co-habitants, so as to ensure its authenticity beyond dispute (p. 170). When a document has been produced when required, and frequently also, it remains valid for ever (Nārada, IV. 140). A document which has not been questioned for twenty years is valid (Kātyāyana). When a thing has been enjoyed for twenty years without question, the document sanctioning the enjoyment is beyond challenge. A boundary dispute can be settled and recorded in a document. If this remains unchallenged for twenty years, its validity after the period cannot be raised. When a pledge is

made, if the pledgee has been enjoying it, the document on the pledge is valid. A document in the handwriting of a wellknown scribe is unquestionable.

Importance of Documentary Proof

A document is stronger than oral evidence or even ordeals (p. 173). A documentary proof can be over-ridden only by another document.

When a document has not been heard of for thirty years, and is then produced, its validity is gone; so also a document relating to a debt challenged to be owing by a wealthy man, who is easily found, is relied on to claim the debt, it is deemed suspicious. A document which has not been heard of for a long time (*bahukālam*), nor seen, or relating to a debtor who is dead, and which is not tied to a pledge, must also be deemed suspect. When a document has been taken away to another country, or is partially burnt, or is badly written and not quite legible, time should be granted to its owner to establish its authenticity. If the document has completely disappeared the evidence of those who had seen or read it must be produced (p. 175).

After a debt is discharged the document recording it must be destroyed (Yājñavalkya, II, 931) or a receipt (*upagata*) for the amount paid taken.

Punishment for forging Documents

The fabrication of royal edicts as well as private documents is a very grave offence, and the capital sentence is prescribed in smṛtis for both (Manu, IX, 232 and Viṣṇu, 9-10). The highest fine is prescribed for one who adds to or writes less than what is containable in a royal grant (*śāsana*).

Jayapatra and Paścātkāra

Lakṣmīdhara mentions both. *Jayapatra* (document of victory) is the judgment decreeing the suit and handed to the successful party. It must contain in a summary form all relevant matters concerning the suit and trial: *e.g.* a summary of the plaint and of the rejoinder, the decision as to the party on whom the burden of proof was laid by the court, and the pleadings and depositions of the parties and witnesses. It should be signed by the King and bear his seal, if the suit was conducted before him, or of the Chief Judge and the *sabhyas* and bear their seals or signatures. The comprehensive character of the document is necessitated by the possibility of appeal or retrial. If the defeated party takes a different stand from that recorded in the *jayapatra*, as his in the original trial, as revealed, his prayer will be rejected. If these were not mentioned in the *jayapatra* there will be no means of knowing what stand the appellant had previously taken. To the defendant also it is of value, if he appeals on the ground of *res judicata* (Raghunandana's *Vyvahāratatva*, p. 60).

A decree which records the grounds for non-suiting a party (*e g.* contradictions in statement, hostile attitude towards judges and witness, non-appearance,

silence, and absconding) is termed *hīnapatra*, as distinguished from *jayapatra*. This used to be given to the defeated party.

Kātyāyana applies the name *pāścātkāra* (p. 169) to the judgments in suits in which after a hot contest the plaintiff succeeds, while the case in which the decree is briefer because the defendant admits the claim is merely a *jayapatra* (P. V. Kane, *Vyavahāramayūkha*, Notes, p. 53)

Possession (*Bhoga, Bhukti*)

Title (*āgama*) and possession (*bhukti*) are the definitive sources of legal ownership, if found together. But each has its own strength too, and ownership may arise from one, or not be lost when the other exists. Possession may be with title (*āgama*) or without it (*anāgama*). Among the ways of acquiring ownership (Gautama, X, 40-41 and Vasiṣṭha, XVI, 16) by gift (in the case of Brāhmaṇas), by conquest (in the case of Kṣatriyas), by trade (in the case of Vaiśyas) and by labour (as wages, in the case of Śūdras, as well as by inheritance, purchase, partition, seizure or appropriation (as of forest trees), finding (as of ownerless property or *res nullius*) and dowry none are specified as conferring ownership by mere enjoyment or possession (*bhoga* or *bhukti*). Possession may be with title or without it. The separation of one from the other may lead to questioning of ownership. When both exist together the title is indefeasible. A verse, cited as from Vyāsa and Pitāmaha (but is not cited by Lakṣmīdhara) sums up the features of a valid ownership as five : title (*sāgama*), long standing, unbroken use, use without objection being raised by any one, and in the very presence of any who questions the right. Yājñavalkya emphaises the need of both for unquestionable proprietary right : "Title is superior to possession (or enjoyment), "—p. 180, and "in title there is no strength if it is not combined with possession even for a short period" (p. 185). Title and possession lend strength to each other. When ownership is transferred it has to be coupled with delivery of possession. Bṛhaspati states that when ownership is acquired in one of the ways mentioned it becomes effective only when coupled with title (*sāgama*, p. 177). Possession is not essential to transfer of property but when uncoupled with it, it is risky.

Long possession is usually construed as a sign of ownership by right also. When land or landed property is enjoyed by another in the very sight (*paśyataḥ*) of the title-owner and without any protest from him, it *will* lead to the conclusion that the possessor has acquired ownership also. Nārada (p. 185) affirms that the enjoyment of a property by one who has no title to it, even for a hundred years makes the occupant liable for punsihment by the king with the penalty prescribed for theft (*coradaṇḍa*, p. 185). Adverse possession, of a property like possession by silent acquiescence, will lead, after the prescribed period of prescription to its becoming the property of this possessor (Nārada,

p. 185). The statement is coupled with the warning to owners not to allow strangers to enjoy their property without protest. Manu holds that an owner who allows his property to be enjoyed by another without protest, does not deserve to get it back (p. 189). Bṛhaspati also warns that he who does not protest when an enjoyer is giving away his property, in his own sight, cannot hope to get it back, even though he has the title deed (p. 188). Ownership in movables as well as immovables can be secured only by vigilance in an owner guarding his title and control of the property (p. 188).

Prescriptive Right in Possession

Ownership will seem without basis if it exists for even generations without an assertion of it by the nominal owner. The application of the rule of prescription can alone avoid the confusion that will arise if an owner, who has long been indifferent to enforcing his right against an occupant, asserts his right after a very long interval. If a property is sold or bought, the buyer will endeavour to safeguard his interests by getting both rights. Ownership (however it may spring) must be clear before one can safely buy a property. It is to meet such cases that prescription arising from long, unquestioned and uninterrupted possession is made to mean ownership even without title. Such smṛti rules as that even a hundred years of occupation by another will not extinguish the owner's right in the property (p. 185, Nārada, IV, 88) and property enjoyed without ownership should be classed with things that are held without ownership (like *anvāhita*, explained by Asahāya as a valuable object received in return for a worthless one), with things that are robbed (*hṛta*), deposits, and those that are held by force, articles lent for use and articles enjoyed in the absence of the owner (p. 185). There are two ways of determining the length of time that will constitute valid precription capable of converting possession into ownership, *e.g.* firstly, by making it equal to what can be remembered even after a long period (*smārtakāla*), and secondly by treating it as passing from generation to generation of occupants in the same family. The first is described as a hundred years, and the second as three generations excluding the present occupier. . This again leads to the determination in years of the life of a generation. Bṛhaspati puts it at 35 years and Kātyāyana at twenty years. Under the former, three generations will mean 105 years, which is the length *smārtakāla* according to the *Smṛticandrikā* (Ed. Gharpure, II. p. 72). The Vedas put the duration of human life as a hundred years (*śatāyuḥ puruṣaḥ*). But as generations overlap, Kātyāyana makes three generation equal to sixty years in which uninterrupted possession developes into ownership (p. 180). Gautma, Manu and Yājnavalkya (II, 24) appear to hold that even twenty years, and Bṛhaspati thirty years of adverse possession will make it ripen into ownership of *immovable* property, while later

smṛtis like Nārada and Kātyāyana would put the period higher and make it sixty years—an apparent compromise between three lifetimes and *smārtakāla*. As regards movable property the duration of use is made lower, and fixed at ten years. It is held that beyond these periods there is *hāni* or loss of right.

What is this *hāni*? Dr. Amareshwar Thakur (*Hindu Law of Evidence*), classifies the different views of jurists on the effect of prescription in producing *hāni* or loss thus: (1) *svatvahāni* or loss of proprietary right, (2) *vyavahārahāni* loss of legal remedy to owner by passive acquiescence of alien occupation, and (3) *phalahāni* or loss of the right to collect the produce, or intermediate profits. The last position is held by the *Mitākṣarā* but is rejected by Caṇḍeśvara, Devaṇṇa Bhaṭṭa and Raghunandana. *Vyavahārahāni* is loss of legal remdey to to the owner by his passive acquiescence in alien occupation, and is apprently based on a text of Nārada that the suit for recovery of property by a person who has been silent and indifferent (*upekṣām kurvatastasya, tūṣnīm bhūtasya tiṣṭhataḥ kāle vipanne pūrvokte vyavahāro na sidhyati*) will not succeed. The neglect is both verbal protest and physical effort to get the property. The owner loses the right of recovering his right by human proofs (*i.e.* he can get them back by ordeals.). *Smṛticandrikā* cites in support of this interpretation a halfverse from *Smṛtisamgraha* to say that absence of occupation (*abhukti*) makes the right of ownership ineffective (*āgamo moghaḥ*), and it interpretes *āgama* as the grounds of claim by documents and witness (*tatpramāṇabhūta-likhita-sākṣiṇau*) *

The loss of proprietary right (*svatvahāni*) by prescription is upheld by Asahāya, the oldest commentator now known on a verse of Nārada (I, 78) declaring that title can be extinguished by adverse possession of long duration. This view is attacked by Viśvarūpa, Medhātithi and Jīmūtavāhana.

The loss of intermediate profits (*phalahāni*) is upheld by Vijñāneśwara. This view is rejected by Caṇḍeśvara and others.

Exceptions to Prescription

Ownership acquired by prescription will not apply to *strīdhana*, the property of minors, of idiots or of temples or of the King. When near relations or a son-in-law or a learned *Brāhmaṇa* is allowed to enjoy a property, the right to it is not lost even by long enjoyment by these. The same rule applies to the property of an enemy (*śatru*, p. 191). The property of persons who are phyically deficient, or are indolent, or diseased or are panicky by nature (*bhīta*) or are away in distant lands, will not be lost by adverse possession (p. 190).

Determination of Interrupted Possession

When interruption of possession occurs in immovable property, the right has to be established by evidence. The relevant witnesses are neighbours, or

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* *Dharmakośa*, I, i, p. 424.

those who know the names, titles, situation, area and title as well as the nature of the interruption of occupation or enjoyment. The decision should be based on such testimony provided the Court is satisfied of the knowledge and impartiality of the witnesses. When evidence of the ordinary kind is lacking in such cases, recourse must be had to ordeals for settling the question (p. 193).

Reasoning (Yukti)

Decisions in suits cannot be delayed unduly. When the evidence of of witnesses is lacking by either their not being able to testify or the delay in in getting them, the Court must exercise its reasoning faculty (*yukti*) to get at the truth, or decide on administration of oath (*śapatha*). Thus, when a defendant does not refute the case against him, even though reminded thrice, in a case of debt, he may be ordered to pay off the debt (p. 194). A defendant's silence, when an assertion he can rebut is made in court, and in his hearing, must be taken as his acquiescence. A person who does not refute the claim for money alleged to have been lent to him should be deemed a debtor. If several assertions are made against the defendant, and one of them alone is proved by evidence, the rest may be taken also as established (p. 195). Circumstances cannot lie, while witnesses can. Circumstantial evidence is thus valuable. In a case of incenddiarism, if the defendant or accused is caught with a firebrand in his hand, or an alleged murderer is found with a weapon in his hands, or an allged adulterer has been found dallying with the wife of of another person with whom he is said to have committed adultery, and seen catching her by her hair etc., or when a bridge has been destroyed and the suspected person is found with a hatchet in his hand close by, or a person is found in possession of stolen property, there are grounds for presuming them to be offenders and proceeding to enquire into their offences. In such cases, reliance on eye-witnesses alone will not establish. Kauṭilya (*Arthaśāstra*, IV, 12) states that an alleged adulterer's guilt may be inferred and held proved by marks of finger nails or teeth or scratches on his body or lips or by the admission of the woman concerned. But, as pointed out by Nārada (IV, 176), such signs must not be too readily accepted as proof of guilt, as a cunning enemy of the accused might make such marks to incriminate his foe. Consciousness of guilt and desire to escape punishment will often induce accused persons, who have weak defences, to try to bribe or corrupt members of the court or witnesses. In such cases, the attempts, if established, might be presumed to point to the guilt of the accused person, or a defendant in a suit for the return of money lent (Kātyāyana, ed. Kane, 337-338). Failure to apply proper reasoning is said to have brought about the conviction of the innocent sage Māṇḍavya as a thief, because from fear of torture he admitted that he was a thief when he really was not one.

Oaths (Śapatha)

Śapatha stands for both oaths and ordeals as means of establishing guilt or innocence. Lakṣmīdhara gives 'ordeal' (*divya*) as the synonym for 'oath' (*śapatha*) in interpreting the expression *śapathakriyā* as the heading of the section in Viṣṇusmṛti (p. 198). He deals with *śapathavidhi*, rules of oaths, after dealing in detail with ordeals. Oaths are very ancient. Manu in justifying them (VIII, 110) states that oaths have been taken both by divine persons and sages for clearing themselves of charges. Medhātithi and Govindarāja point out that the seven sages purified themselves by oaths, when accused mutually of stealing lotus fibres (*Mahābhārata*, XIII, 93, 13 ff.), and Indra took an oath when accused of adultery with Ahalyā. When Viśvāmitra charged Vasiṣṭha with being a demon and with having devoured his sons, the latter cleared himself by a *śapatha* (Ṛgveda, VII, 104, v. 15).

The oath must be taken in connection with something vital to the *varṇa* of the person subjected to it: thus, the Brāhmaṇa must swear by Truth, the Kṣatriya by his weapons and vehicle, the Vaisya by cows, seed-grain and gold, and the Śūdra by imprecating on his own head all sins (*pātaka*). They should be made to touch the heads of their wives and children (invoking suffering on them if they swore falesly. Bṛhaspati (p. 256) suggests oaths only for minor offences, and ordeals for major ones. The swearer must swear by his acquired spiritual merit, and offer to lose it if he swears falsely (p. 257). When the oath taker is not met within a few days by misfortunes, he will be deemed cleared of the charge. The limit for the misfortune is the fourteenth day.

Ordeals (*Divya*)

Ordeals are divine means of proof and so are termed *divya*. The Supreme Being or Divinities are held to intervene, when properly approached, and indicate guilt or innocence, after an ordeal is performed in the manner laid down by smṛtis. The idea is widespread in the world. The use of the ordeal is based on the belief that God intervenes miraculously to vindicate innocence and establish guilt, when other means of doing so are unavailable. *Divya* is defined by the *Divyatatva* of Raghunandana (p. 574) as that which decides a matter in dispute when it cannot be decided by human proof (*mānuṣapramāṇa-anirṇeyasya nirṇāyakam yat tad divyam*). Nīlakaṇṭha (*Vyavahāramayūkha*, ed. Kane, p. 44) defines *divya* as that which decides a matter in dispute not determinable by human proof (*tattu mānuṣapramāṇa-anirṇitārtha-nirṇāyakam*). The use of ordeals is ancient and world-wide. Medhātithi gives a rational explanation of the application of ordeals and oaths by pointing out that they are means of frightening superstitious persons into telling the truth (VIII, 116). But he counters this statement by saying that the failure of ordeals to establish innocence cannot make one reject them, as similar failures occur when recognized

means of proof are also applied. Nārada's (IV, 241) direction that *divya* is to be applied when transactions done in secret, without witnesses, in lonely places or at night, when ordinary evidence is naturally unobtainable, show that it is to be a last resort. Sītā sumitted to an ordeal (not of the nine kinds described in smṛtis) to prove her chastity. The dependence of the ordeal on belief in its effect by the party subjected to it is shown by the rules interdicting its application to cases where the party to be subjected to it is an atheist (Nārada, IV, 332, p. 207) or a *vrātya*. Similarly an ordeal should not be offered to those who are irreligious, those who wear queer emblems of sects, and experts in *mantra* and *yoga*, who might counteract the ordeal by their special powers (p. 208.). It is also apparently on this ground that ordinarily *both* parties must agree to the application of the ordeal, though in certain cases the King can order its being used in grave crimes. The religious basis of the test is also shown by its interdiction to those under a religious vow (*savrtāḥ* p. 207). The fear of chances of escape of the criminal if an ordeal is applied in cases of parricide, matricide and the five great sins (*māhāpātaka*, p. 208) leads to their being discouraged in such cases.

It is noteworthy that the earlier smṛtis do not deal much with ordeals. Gautama, Vasiṣṭha and Baudhāyana are silent on its application. Manu mentions only two, *viz.* the fire ordeal and plunging into water. Yājñavalkya and Viṣṇu mention five ordeals, and Nārada mentions in addition to these the *taptamāṣa* and the *taṇḍula* ordeals. The full number of nine ordeals is mentioned by Pitāmaha. Bṛhaspati (p. 198) also names all the nine. These are:— (1) the ordeal of the balance (*tulā* or *ghaṭa*); (2) the ordeal of fire (*agni*); (3) the ordeal of water (*toya*); (4) the ordeal or poison (*viṣa*); (5) the ordeal of consecrated water (*koṣa*); (6) the ordeal of grain (*taṇḍula*); (7) the ordeal of the heated piece of gold (*taptamāṣa*); (8) the ordeal of the ploughshare (*phāla*); and (9) the ordeal of Dharma. Instances of the use of these are found in history.

Application of Ordeals

Ordinarily the ordeal was imposed on the defendant. If he gets over the ordeal he wins. But Yājñavalkya (II, 99) gives the option to either party to undergo it by agreement. The defeated party has to pay a fine (*Śirṣa*) in addition to the loss of his case. An alternative is an offer by the party to undergo corporal punishment, if the test goes against him.

Ordeals are selected according to the value of the matters in dispute. All claims of over 1000 cooper *paṇas* are to be regarded as of great value, and to them the ordeals of balance, fire, water and poison are applicable. In cases of the "five great sins (*mahāpātaka*)" any one of the five may be applied without consideration of value on a money standard, and without binding the loser

made to drink the libation of the Sun-God (p. 246). Śodhyas accused of theft and soldiers must drink the libation of Durgā. In the case of minor charges, the water in which the weapons or emblems of the god have been bathed are enough (*Viṣṇu,* p. 246).

A guilty person subjected to the ordeal will be afflicted with illness or calamities within a few days of the test. The death of near relations *(jnāti-maraṇa)* is one such misfortune (p. 247). Fever, dysentery, boils, pain in the palate and in the bones, throat diseases, head-ache and fracture of the limbs, as well as 'seizure by evii spirits' *(daivikavyādhi)* are examples of such misfortunes (p. 248). Pitāmaha (p. 247) allows three, or seven or fourteen nights for the appearance of such marks of divine displeasure on a guilty *śodhya* (p. 247). Fires are other results. He on whom no calamity falls within fourteen days of the test, is declared by Yājñavalkya (II. 113) as cleared of the charges fully (p. 248). If misfortunes of this kind come after the lapse of a fortnight, they are not to be taken as justifying a fresh test, says Nārada (IV, 331, p. 248). Bṛhaspati explains (p. 249) that the indication of a fort-night or three weeks as the termination of the period within which the results might be seen are dependant on time, place and subject matter for which the ordeal is imposed (p. 249).

Ordeal of Grain (Taṇḍulavidhih)

This ordeal, which is not one of the classical five, already described, is to be imposed on Śūdras alone (p. 250). Rice should be soaked in the water in which idols have been bathed, and it should be kept so for a night. The next day the *śodhya* must be made to eat it, facing the Sun. He must be made to spit and if the spittle is found free of blood he is innocent, and if blood appears in it, he is deemed guilty. A sign of guilt is shivering or if blood appears at the end of jaw (p. 251).

Ordeal of a Hot Piece of Gold (Taptamāṣaka-vidhiḥ)

Twenty *palas* of *ghi* (*ghṛta*) or oil (*taila*) should be boiled in a vessel of copper, iron or earth, 16 inches in width, and four inches in depth. When the liquid is boiling hot, a piece of gold should be dropped into it. The *śodhya* must lift out the coin, with only his thumb and forefinger. Before the ordeal, the usual invocation to Dharma must be recited. The tested person should not shake his hand, with pain, and if boils do not appear on the fingers, he is declared cleared of guilt (p. 252).

Ordeal of the Plough-share (Phālavidhih)

A plough-share of iron, weighing twelve *palas,* and eight fingers long, should be made red hot and the thief (*corah*) to whom this ordeal is offered,

must lick it with his tongue. He is declared innocent only if his tongue is not singed, (p. 254).

Ordeal of Dharma (*Dharmaja-vidhiḥ*)

Pictures of Dharma and A-dharma should be drawn on two bits of paper, in white and black respectively. After the recitation of the usual invocatory *mantras*, which are believed to inspire the papers with life, the two papers are invoked, and after having bathed them in *pañcagavya* they must be concealed in clods of earth, and the clod should be placed within two new pots, which should be filled (with earth). The *śodhya* should pull out a clod, and if the picture of Dharma is found within it, he is cleared, and he is deemed guilty if that of A-Dharma is pulled out by him (p. 254).

Other ordeals

These nine exhaust the standard number approved. But in practice others have been in vogue, sanctioned by local custom, like putting one's hand in a pot within which is a cobra.

Manner of Decision (*Nirṇayaprakāra*)

It has already been stated that the the four steps of a trial in court are the plaint, the rejoinder of the defendant, the court's decision as to who should let in evidence first (*i e.* the party on whom the burden of proof is laid *i.e. pratyākalita*) and the evidence (*kriyā*). The ways of arriving at a decision (*nirṇaya*) are stated by Vyāsa (p. 258) as *pramāṇa* (*authority*), evidence, usages, oaths, king's order as compounding of the case by the parties (p. 258). Proof rests on documents (*likhita*) witnesses and occupation (*bhoga*) and as a fourth on inference (*anumāna*) from circumstantial evidence. When every means of proof is unavailable, the decision must be made by the king, acting on his own judgment (p. 258). A similar stand is taken by Bṛhaspati who makes Dharma, Vyavahāra, Caritra and Rājaśāsanam the four means of decision in cases of doubt (*sandigdha*). When the defendant is put on oath (*śapatha*) the decision is by Dharma, as also when ordeals (*divya*) are applied. That is said to be (*vyavahāra*) (or decison by legal proof) in which the judges use such means to establish what is right. *Vyavahāra* alone enables a decision when prevarification in a rejoinder is exposed (Bṛhaspati, p. 259). Whatever is practised, which is consistent with Dharma or not, is termed following local usage (Kātyāyana, p. 259). When a decision is made on circumstantial evidence it is termed *caritra* (ib). The king's order is to be made in those cases in which no evidence of the other kinds is forthcoming. In cases of doubt, owing to the conflict of authorities or total absence of evidence, it is the authority of the king that has to settle the matter (p. 259).

But the king's decision by command must be in conformity with justice

to pay a fine on defeat. Bṛhaspati (p. 199) grades the ordeals according to the value of the matter in dispute, beginning with the poison ordeal for 1000 paṇas and above, and going down to the ordeal of Dharma when, the value is 100 or less. The value must be rated lower for a Śūdra than a Vaiśya and so forth (p. 201). The decision as to the test to be applied rests on the Judge.

Time for Application of Ordeal

The selection of the ordeal also depends on the time when, in view of the matter being before the Judge, it has to be applied. Thus the ordeal of the balance may be applied at all seasons, but must not be used when a strong wind is blowing (Nārada, IV, 259). The fire ordeal must be tried during rains, balance ordeal in winter *(śiṣira)*, water in summer and poison in cold seasons.

The water ordeal is prohibited in winter, and fire in summer (Nārada, 259). Pitāmaha (p. 203) rules that the months of Caitra, Mārgaśīrṣa, and Vaiśākha are good for applying all ordeals.

Astrological Time for Application

As divine tests must also follow suitable times, the *Mitakṣarā* (11,97) rules thus : " In astrology, when Jupiter is in Leo or Capricorn, as also when Venus is in obscurity, and in an intercalary month, an ordeal should not be tried ; nor when Venus has become invisible. Also when the Sun is in Leo a test should not be applied nor on the eighth and fourteenth lunar days. The test and inauguration shall be on a Saturday or Monday. " The *Mitākṣarā* adds that a Sunday is recommended by respectable people (*śiṣṭa*).

Procedure in Ordeal

Bṛhaspati states that an ordeal applied in improper places or times will be ineffective (p. 212). If it does not also follow the procedure laid down, it fails. It must ordinarily be in a court, and before assembled people, and in the presence of the king (or chief judge) and learned Brāhmaṇas. Both the parties and the judges should bathe and the party should have fasted for a day and night, and be clad in wet clothing when tested. All ordeals should be in the forenoon (p. 213). The ordeal should be repeated if it fails (p. 213).

Ordeal of the Balance (Dhaṭavidhih)

The balance should face east and be erected ordinarily in the court house (p. 215), but it may be near the flag staff of Indra, or the Palace gate or at the junction of four roads. This is to ensure due publicity. It should be decorated. Vedic prayers and hymns should be chanted during the ordeal (p. 216). Images of the gods should be installed in front of the scales. The person tested should sit on the northern scale and on the southern weights must be placed. The balance should be invoked and an imprecation on frauds must be recited (p. 220). The man must be reweighed. If he has lost

weight in the interval, and the balance rises he is innocent, and if it lowers he is guilty. When it remains unaltered the result is indecisive (p. 222) and a second test must be made (p. 213); so also if the balance breaks during the test.

The Fire Ordeal (pp. 224-233).

Figures of eight guardians of the quarters in circles *(maṇḍala)* must be made with cowdung, and *kuśa* should be placed in each circle.

The person to be tested should stand with wet clothes on the western *maṇḍala* with his palms open. The palms should be rubbed with grain to make any scars or wounds on it visible before the test. Leaves should be laid on the palms, and a red-hot piece of iron should be laid on the palm. An invocation to the God of Fire should be made. He should walk seven steps holding the red-hot iron and the palm should be rubbed with grain. If at the end of the day the palm is found un-disfigured the person is declared innocent (p. 232). Even a slight burn will be evidence of guilt. (p. 233)

The Water Ordeal (Toyavidhih) (pp. 234-239).

Smṛticandrikā (II, p. 116 ed. Gharpure) states that the ordeal of water had gone out of use in its time. An invocation of Varuṇa begins the proceeding. A target, 225 feet from the person to be tested, is erected. Three arrows are shot by two Kṣatriyas, while the person to be tested *(śodhya)* stands in water near a man standing in it with water upto his navel. After two arrows have been shot, *śodhya* stands in the water, holding the things of the man standing in water and then must dive into it. If when he raises his head the archer, who runs to seize the shot arrow does not see the back of his head, the *śodhya* is freed from guilt, but if the *śodhya* is found floating away from the place where he sank, he is guilty.

The Ordeal of Poison (Viṣavidhih)

After finding out if the *śodhya* has taken any antidote, the poison is to be administered, mixed with 30 times its weight in *ghi*, and might be of 6 or 7 grains weight, and it should be given when the *śodhya* has not breakfasted (p. 242). An invocation to the poison should be chanted before it is administered. If the *śodhya*, after taking the poison, is found at the end of the day free from vomiting or facial signs of pain, he should be deemed innocent. For fear of deceit the *śodhya* should be watched for some nights (p. 244).

Ordeal of Libation (Kośavidhi)

The ordeal of the sacred libation may be held at all seasons. A *śodhya* must drink the water in which the idol of his favourite deity or the deity's weapon has been bathed, or the water in which the image of Durgā has been bathed or the image and circle of the Sun *(Sūrya)*. A Brāhmaṇa must not be

tithi). A decision which has accepted false evidence and is based on it is void. A judge should declare as void any mortgage, or gift or sale or acceptance, or other transaction in which he detects fraud (p. 271). All transactions exacted by force are void (Manu, VIII, 168). An agreement made by a person who is insane, or drunk, or grievously oppressed at the time by disease or by a slave is void. The acts of a minor are void. A person who is overpowered by love, or by fear or rage or by friendship is not competent to make a valid agreement. Transactions by a slave are void unless sanctioned by his owner. Gifts, mortgages, and sales made by those who are unfree are void, unless approved beforehand by those on whom they are dependant (p. 272). Unless a woman is forced by distress (*anāpadi*) her mortgages, and gifts are void, but a woman's acts are valid if sanctioned by male members on whom she is dependent, like father, son or husband. The acts of the head of a family are valid only when he is free and in full possession of his mental powers (p. 273).

Legal Independence (Svātantrya)

As an act is valid only when done by a person who is free to do it, and the determination of the independence of different persons is necessary in law (Nārada, p. 274). The senior son in a family is its head and is independent. Three are free to act legally: the king, the preceptor (*guru*) and in all *varṇas* the householder *within* his own family. A pupil is unfree. Wives, sons and slaves are unfree in a family. A boy of eight or under nine is like a child in the womb; a boy between eight and sixteen years of age (*poganḍa*) is competent to do only religious acts. The sixteenth year is the beginning of majority. He is independent except as regards his parents, and his dependence continues as long as the father lives, even though he (the son) becomes grey-haired. The seniority in the family goes from father to mother and then to the eldest son. The junior members of a joint-family are legally not free. The younger members are free to act if authorised so, in the absence abroad of seniors. Whoever is appointed to do an act (if he is not a minor) is free to do that act (p. 276), and so is he who is specially empowered to act as an agent (*nisṛṣṭārtha*). A father has no right to sell or give away his son, and giving a son in adoption is restricted to a minor son, who is not also the eldest son. Mitramiśra restricts even this power only to normal times and periods in which the family is not in distress (p. 276)

PART TWO

SUBSTANTIVE LAW VIVĀDAPADĀNI

Vyavahārapadāḥ:

Vyavahārapada or *vivādapada* means "topic or subject of a dispute or law-suit." They are usually stated as eighteen in number. Manu, who enumerates the eighteen (VIII, 4-7), describes them as topics which give rise to law-suits. It is described by Yājñavalkya (II, 5) as a complaint to the king by a person who thinks he is injured by another in a manner contrary to law and usage (*smṛtyācāravyapetena*). The topics coming under this head have been traditionally brought under eighteen heads. Manu, who accepts this, adds however that the disputes of men come mostly (*bhūyiṣṭham*) under one or other of these eighteen heads. It implies that the enumeration does not exhaust all possible topics of litigation, as noted by Kullūka (" by the word *bhūyiṣṭha* it is implied that there are other topics of law, *anyānyapi vivādapadāni santi.* In enumeration there is some difference both in the order and in the topics dealt with among the eighteen. Dr. P. V. Kane has given a tabular statement showing the eighteen topics as given by Manu, and the same with some additions, given by Kauṭilya, Yājñavalkya (according to the *Mitākṣarā,*), Nārada and Bṛhaspati. The number according to these is sixteen, twenty, eighteen and nineteen respectively. (*Hist. of Dharmaśāstra,* III, p. 249). As usual with him Lakṣmīdhara indicates in his *pratijñā,* at the beginning of the kāṇḍa, the topics that he deals with. But in it he makes subdivisions of headings, and does not follow the enumeration as under eighteen heads. But like others, he adds many topics primarily omitted, in the *prakīrṇaka* at the end.

But his habitual preference to Manu as an authority is seen here also in his following mostly the order of enumeration and the nomenclature of topics given by *Manusmṛti.* To a modern mind the classification will not seem scientific, but a rough discrimination between topics of civil law and criminal law emerges in the enumeration. A vital difference between modern systems and the ancient Indian is that in the latter both civil and criminal matters are brought up before the same courts and decided by them, though with small differences in procedure. Smṛtis note that law suits spring from demands about wealth or injuries. Yājñavalkya (II. 23) refers to the former as *artha-vāda* or disputes about wealth. The first fourteen roughly deal with civil suits, and the other four with *vākpāruṣya* (defamation and abuse), *daṇḍapāruṣya* (assault and battery), *sāhasa* (crimes of violence like murder), and *strīsangraha* (adultery). The rules regarding procedure and witnesses is almost the same for both civil

and Dharmaśāstra, according to both Bṛhaspati and Kātyāyana, and it is issuable only when there is a conflict between *śāstra* and the opinion of the assessors (*sabhyāḥ*). Dharma rests on truth, ordinary judicial work on witnesses, customs on records of usage, and the royal command on his edict (*śāsana*). The king attains fame for justice who knows the way of decision of cases in this fourfold manner (p. 260).

Relative Force of Different means of Decision.

The chief rules on the subject are those which have led to much misunderstanding by modern writers, and the creation of the myth of a regal power to create law by mere fiat. It has been dealt with already on pp. 6-8. The cryptic statement that among the four bases of a trial—Dharma, Vyavahāra, Caritra and Rājaśāsana, each succeeding over-rules those preceding it has led to the myth of a royal absolutism, and Kauṭilya, Bṛhaspati and Nārada are supposed to have indicated it in such dicta. A decision by *vyavahāra* is one made exclusively by law (*śāstra*). It over-rules moral law. When a decision is based on custom, the usages or opinions of traders (*naigama*), it over-rules ordinary law (*vyavahāra*): for the king should not go against the usages of *pratiloma* castes, or tribes living in mountains etc. even if they contravene smṛtis (p. 262). A king can overlook customs and pass a judgment according to his own conviction, thereby his command over-ruling custom (*caritra*), because it is opposed to equity. The rule can have effect only in such circumstances, and only then can Dharma be saved from suppression (*bādhaka*,) (p. 262).

Action consequent on Decision (*Nirṇītakṛtya*).

When a defendant has been decided against either by his own admission, or by observation of his demeanour by judges, and has been found to be wrong, the judges have to pronounce a judgment against him. Their decision will be given effect to by the king. If the defendant has merely denied a claim which is ultimately established against him by the trial, he must pay to the plaintiff the amount claimed, and also an amount equal to it to the king. A plaintiff, who sets up a false claim, which is rejected by the Court, must pay to the king double the amount claimed. These are obviously penalties for needless litigation over and above court fees. Manu makes the penalty on the defendant, against whom the decision goes, smaller. Thus, he rules (VIII, 139) that the court fee is 5% of the value of the claim and the penalty an additional 5%, making the amount payable by the defendant to the king 10% of the amount claimed if the claim was admitted and 10% over and above the court fee of 5% if the claim was denied. The admission by the defendant of the claim may be after his first denial of it. Such admission reduces the fine (Vyāsa, 264). Men of the Śūdra varṇa who make a false charge against a 'twice-born' person may

have the tongue slit by the king's order (Nārada, II, 37). When the defendant has denied many points in the claim, as made out in the plaint, and later on one point alone in the plaint is proved as against the wholesale denial by the defendant, the entire claim may be decreed, but not anything not included in the plaint (Nārada, p. 265). When a dispute is coupled with a wager (*sapaṇa*) and is decided the defeated party must pay the king the amount of the wager, in addition to the fine, and also the amount in dispute, to the creditor (p. 265). This is in accordance with the rule that the punishment should be suited to the offence (Bṛhaspati, p. 265).

Acknowledgement of Success in the Suit (Jayapratipatti)

Winning the suit is indicated by the suitor gaining the suit, after proving his case, or after honorable discharge by the judges, and his receiving a document recording his victory or discharge. The court will commend the successful plaintiff and order him to be put in possession of what he has claimed. A document that has been rejected by the court should be torn up at once.

Appeals (Punarnyāya)

When a judgment has been given and executed, after trial in the (king's) court, it should not be reopened (Manu, IX, 233). But, according to Nārada, the case can be tried again if the vanquished party feels that the decision is unjust, and agrees to pay twice the fine inflicted. A suit can be taken up again when a defeated party urges that he has lost it through the dishonesty of witnesses or assessors (and undertakes to establish it), but the case cannot be retried if it has been lost by his own inconsistencies or conduct (p. 267). An appeal will not lie for a defendant who has run away without filing his reply. If decisions of families or groups (*kula*) do not satisfy parties, they can be taken up by the king for retrial. The appellant shall be fined twice the normal amount if he loses his appeal (p. 268). A judge is not immune from punishment if he decides unjustly. The king should rectify wrong decisions and punish those responsible for them (p. 269)

Acts That Are Void

A trial conducted outside a village, or at night or in the interior of a house, without a large audience as laid down for judicial trials, is void and any sentence passed in such conditions may be reversed or set aside. Asahāya (p. 270) notes as against "*strīsu*" in this verse of Nārada (I, 43) that it implies a suit started by a woman or wife without sanction of husband, son or father is void. Night he points out, is not a proper time for trials. An agreement that runs contrary to established usage or law is void, even if it is established by evidence, *e.g.* one for the sale of a wife or children, or for giving away the entire property by the head of the family when there are sons (*Medhā-*

and criminal trials, with the exception that in the latter the king or the state initiates proceedings, and the decision is even quicker. It may be noted however that though the topics do not exhaust all possible cases that might need relief from courts of justice, they virtually exhaust such of them as must have been common in ancient Indian society, which had not attained the complexity, economic and social, that modern society has reached. The order of treatment also seems to follow that which indicates topics which would come up more commonly than others. But Lakṣmīdhara deals more extensively with matters that are necessary for the understanding and enforcement of the topics generally in the supplementary sections following those on the main topics (pp. 5-6).

Law of Debt

Ṛṇādāna, or non-payment of debts is the first head of civil law dealt with in smṛtis and digests. The section begins with a verse of Nārada (p. 277) which describes the contents of the law of recovery of debt as dealing with the nature of the debts that must be repaid and need not be repaid, by whom and in what form repayment is to be made and how it should be given and how received back. He gives the familiar fanciful derivation of *Kusīda* (interest on a loan), given by Bṛhaspati as indicating an exaction from a man in difficuties, even fourfold or eightfold of the sum lent. Dr. Jolly (*Bṛhaspati*, p. 320 n.) states that that word *Kusīda* is really derived from *Ku* and *sīda* and denotes " that which adheres and cannot be easily got rid of."

A loan must never be given without adequate guarantees (*viśrambha*). It should be made on the furnishing of a surety (*pratibhū*) or a pledge (*ādhi*), or securing a deposit which is not to be used by the creditor (*bandha*) or an attested document (*lekhya*). Money should not be lent to dependant women, slaves or minors, as such loans are not recoverable (p. 278).

Rates of Interest (*Vṛddhi*)

The traditional rate of interest on secured loans is 15%, according to Gautama and Vasiṣṭha, and endorsed by Manu, as well as Yājñavalkya. Viśvarūpa (p. 275) says that the rate is to apply only to loans made to Brāhmaṇas. It is to be counted monthly. Vyāsa makes a distinction (p. 279) between a loan made wifh only a surety (*pratibhū*) and that with a pledge, and it is to be at one-sixtieth, instead of one-eightieth under the rule of Vasiṣṭha, *i.e.* 20 per cent per year instead of 15 per cent. The legal and moral maximum rate is stated by Manu as 2 per cent per month or 24 per cent per year. This is also the rule of Hārīta, who states that thereby the capital will be doubled in four years (p. 280). The rates rise according as the *varṇa* of the borrower descends, *i.,e.* 2 %, 3 %, 4 % and 5 % from Brāhmaṇa to Śūdra, which may reflect variation of credit lying according to *varṇa*, as the rates are to apply only to unsecured loans (*bandham vinā*, p. 281)..Gautama

does not approve of unsecured loans, even at higher rates, for more than one year (p. 281).

Kinds of Interest

They are described as of four or six classes: ' bodily interest' (*kāyikā*), periodical interest (*kālikā*), interest which grows like hair day by day (*śikhāvṛddhi*), interest of enjoyment (*bhogalābha*), like using a cultivated field or pledged house rent-free, compound interest (*cakravṛddhi*), or a rate stipulated by the debtor (*kāritā*) in view of mutual needs. Where interest consists in using a pledged animal, like a cow, or horse, it is *kāyikā*. Manu rules that interest on *money*-loans should not exceed double the principal. In such a case the rule can be evaded in spirit by renewing the debt, and adding the earned interest to the original capital. This is allowed. Articles or commodities that are lent may be liable to variation in value and also decay. This will account for loans of grain, fruit, wool and beasts of burden being allowed to rise with interest to five times the value of the article originally. Gold and silver are treated as money in loans. It may go up to eight times the principal in loans of wines, oils and spirits. Risks govern interest rates *e.g.* loans to forest travellers, voyagers by sea etc. traders by sea (*samudrayānakuśalāḥ*). Workless persons who transgress habitually the rules of *varṇa* and *āśrama*, according to Visvarūpa's interpretation of Yājñavalkya, II, 38, should pay an interest of 20 per cent per month, the implication being that they are not trustworthy borrowers. Lakṣmīdhara (p. 284) takes the expression as referring only to those who are engaged in maritime trade.

Local usage must be respected in regard to maxima of interest allowed, which may according to such usage go up to even eight times the original sum borrowed (p. 285).

When a loan is repaid, the pledge deposited must be returned.

Special cases.

When the price of an article that has been bought is not paid, it begins to bear interest after two months (p. 287), at 5 per cent per month. A friendly accommodation in the form of a loan bears no interest, till it is demanded back, and if not returned then, it bears an interest of 5 per cent a month (p. 287). When the lender does not ask for the return of the money lent to a person who is going out of the country without returning the loan, it begins to bear interest after a year.

When female slaves and cattle are lent, with power to use them, their offspring shall be deemed to be the interest (p. 289), *i.e.* the lender can take the offspring in lieu of interest.

Cases in which Interest is not due (vṛddhiniṣedha)

Without an express agreement, the following are deemed as not liable to payment of interest, according to Nārada : price of articles sold, deposits, fines, what has been abandoned and found by another and the winnings in a game. a gambling debt, or what has been won by a trick *(chalena)*. No interest is claimable on dowries and surety amounts. Property lent but refused to be taken back by the lender bears no interest, if deposited on refusal with a third party (p. 291).

Pledges (Ādhi)

The pledge is termed either *ādhi* or *bandha*. It is classified in various ways according to the terms on which it is made. It may be given to be kept in custody only, or it may be given to be used or enjoyed. It may be stipulated that it will be redeemed within a stipulated period or it is agreed that the pledges retain it till the debt is repaid. In the first case there is an express or implied condition that the article pledged becomes the property of the pledgee if not redeemed on the date specified. A pledge must be carefully preserved by the pledgee in its original form ; otherwiise, the interest promised is forfeited and even the principal if the article is lost. Deterioration of a pledged article in quality when in pledgee's custody will entail loss of interest. There is no interest due on an enjoyed article pledged. If a pledged thing is lost, except by 'an act of God or of the King,' the pledgee must make good the loss. If a pledged article loses its value in course of time the pledger must supplement the pledge to the limit of the original value (Yājñavalkya, II, 60). A pledge must be merely kept and must not be used by force (p. 293) ; if this is done, the creditor loses his entire interest and must make good the loss to the pledger. A pledge to be simply kept which is used by the pledgee, leads to the forfeiture of the agreed interest. A pledgee should not insult or harass the pledger on pain of a fine (p. 295). The article pledged must be given back on repayment of the sum lent (p. 295). If the borrower is unable to find the creditor, he may pay the lent amount to the creditor's family and take back the pledge (Yājñavalkya, II, 63 ; p. 296). A pledge which has been made on condition of redemption by a particular date, or when the loan's value is doubled with interest, must be redeemed when the date expires, with an allowed margin of ten (Vyāsa) or fourteen (Bṛhaspati) days of grace. A pledged article, given for use, cannot be sold by the pledgee even after a long time after the agreed date for redemption (p. 298). A debt under a pledge may be repaid within a stipulated period by agreement (p. 299). When the loan is made on a pledge of a person's spiritual assets (*caritram. e g.* the merit acquired by a bath in the Ganges, or by performing daily rites for the Fire) the borrowed amount must be returned when due along with the interest that has accrued (p. 299). When

the pledger has disappeared, the pledgee must hand over the article pedged to the King, who will authorise its sale and payment of the dues to the creditor. If there is a balance after the creditor's dues are taken it must be paid to the King, if no relations of the debtor exist. In the latter case the balance should be paid to them, according to Mādhava and Pratāparudra.

If an article is pledged to two persons, it should be his to whom it was pledged first, and the pledger is punishable 'as a thief' (p. 301). In the case of a plot of land being thus mortgaged to two persons, land should be under the man, who has been the first to take possession of it (Bṛhaspati, p. 301). The same rule applies to other landed property also (Vasiṣṭha).

If neither of the two persons to whom the article has been pledged on the same day, has taken charge of it, the pledge should be equally divided between them. When a man neither uses a pledge, nor takes it from the debtor, nor mentions it to others, any document that he may have about it is invalid, just like a document of which the executant and witnesses are dead (p. 300).

Law of Surety (*Pratibhūvidhi*)

Suretyship may be for appearance, trust or honesty, or payment (Yājña-valkya, II, 53). Bṛhaspati adds a fourth purpose, *viz.* delivering the assets of the debtor (*Ṛṇidravyārpaṇa*, p. 304). Hārīta mentions a fifth object, *viz.* to remove fear (*abhaye*). If a surety for appearance of a person cannot produce him at the time and at the place agreed upon, he should pay the creditor the debt due except when the debtor is prevented from attending by an act of God or the King. A period of three fortnights will be allowed the surety to produce the creditor, beyond the date agreed upon. If the surety produces the debtor within this period, he is free from liability to pay the debt. A surety should not be harassed unnecessarily (p. 397). If he has to pay the debt, he must be allowed to pay by instalments. When the debtor is himself present, the surety must not be proceeded against (p. 307). If a surety being pressed by the creditor pays the debt he has stood surety for, the debtor should after a month pay him twice as much (p. 307). The failure of a surety for payment to pay the debt to the creditor, on the default of the debtor, by death makes his son or sons liable for the payment but the son need pay only the capital amount and not the interest. The grandson is not liable at all.

Who cannot be a Surety

Every person is not entitled or eligible to be made a surety. The list of persons who are disqualified for suretyship is given by Kātyāyana (ed. Kane, 114-116). The debtor's master, his enemy, a nominee of his master, one who is in prison, one under sentence for an offence, one accused of a crime, one holding a property jointly with either the debtor or creditor, a friend, or life-long pupils, a servant of the king, renunciates (*pravrajitāḥ*), a bankrupt, one whose

father is alive (and who is therefore master of the family estate), a wayward person and an unknown person. Husband and wife, father and son cannot be surety for each other (Yājñavalkya, II,54).

Relief for the Surety

A surety who has had to pay on behalf of a debtor for whom he has stood surety can recover the amount he has had to pay the creditor later on from the debtor himself. Yājñavalkya (II, 56) will make the debtor pay the surety twice the amount paid by him, but he is not liable for such a payment if the payment has been made by the surety without his knowledge.

Repayment of Debt (Ṛṇadāna)

The repayment of a loan must be made on one of three occasions: on demand, if no time has been fixed for the repayment, or, if a time has been fixed on the expiry of it, or when interest has ceased by becoming equal to the principal. The son should pay the father's debt even before discharging his own, and a debt by the paternal grandfather must be paid even before the two. Whoever gets the inheritance gets this liability to pay also. The liability is in proportion to the share in inheritance (*yathāṁśataṭḥ*). A tainted debt (*i.e.* one contracted for paying for drinks, lustful acts or gambling) need not be paid, nor *one* repudiated by the father himself. If the grandfather's debt is not repaid by the grandson, owing to the father being afflicted with disease, the liability is, as already pointed out, only for the ascertained (*vibhāvita*) principal and not for the interest. Such liability ceases with the third descendant *i.e.* the grandson (p. 310). In the case of an undischarged loan, the liability, if evidenced in writing, continues to the fourth and fifth generation even, according to the *Mitākṣarā* and Lakṣmīdhara (p. 311). Turning an ascetic or being abroad for more than twenty years, or suffering from leprosy or blindness or insanity makes a debtor's liability descend on his sons and grandsons even during the debtor's lifetime (*Viṣṇu*, p. 312).

A debt contracted jointly or severally by coparceners in a family shall be paid by any one of them who is amenable, but after partition of the family property they are liable only upto their shares in family heritage, if the debt has been contracted by the managing member for family purposes (p. 312). A young man, though free, if he has not attained the years of discretion, is not capable of contracting a valid debt (p. 313). Debts contracted by the head of the family for meeting sudden emergencies (*āpadkṛta*) are binding on the family (p. 314) as well as loans contracted for the expenses of the marriage of girls of the family or for funeral expenses. Manu is credited with the view that a debt contracted for the sake of the family even by persons ordinarily incompetent to do such acts, like the wife, the mother, son or pupil of the family head or even his slave are binding on the family (p. 315). The father must discharge the debts of

a son contracted by the father's own order, or for family maintenance or to meet a difficult situation (*kṛccchre*), according to Nārada (p. 315). The ordinary rule that a father is not liable to pay the son's debts is met as above, and also if he had authorised his son to borrow. A son is not liable to pay amounts due by his father as surety, fine or customs duty (p. 316). What has been promised to another woman than his wife (from lust) is not binding on a man's son. A debt due to a father's fit of rage in which he injures another is similarly not binding on the son. A wife's debt does not bind the husband or son, unless contracted for family needs. In the case of certain classes of people, whose income depends on the earnings of their wives (*e g.* vintners, hunters, washermen, herdsmen and sailors) their debts bind the husbands. The debt contracted by a wife along with her husband or by herself is payable by her, but according to a decison of the High Court of Bombay, only to the extent of her separate property (*strīdhana*).

Liability to pay debts goes with the right of succession. A sonless widow if desired by her dying husband to pay his debts must do so, or it must be paid by him who inherits the dead man's estate. (p. 318). He who takes the widow of a man as his partner in life (*strīgrāhī*) is liable, according to the *Viajayantī* (p. 319) to pay his debts. Debts contracted by a virgin widow who remarries (*punarbhū*) and a woman married by force to another man than the husband she is married to (*svairiṇī*) must be paid by those who take them as wives (p. 319). After the death of a man, who has left debts, the order in which the debts should be paid by him (son or collateral relation, as the case be) who gets the wealth of the deceased, cr he who takes the wife of the dead man, or a son who gets no property from the father is stated thus (Yājñavalkya, II, 51; Nārada, IV, 23; Viṣṇu, VI, 29-30 and Kātyāyana, 562, 577). Whoever takes the wealth of the deceased (if he has left wealth as well as debts) must pay the debts first; next, if the deceased left no property but only debts, and if a man has taken the widow (*yoṣidgrāhī*) as his partner (either as remarried wife or as concubine) he is liable for the debts, the presumption underlying the rule being that the widow is the property of the deceased and he who takes her as a mistress is like one who gets a deceased man's assets; if the deceased has left no property or wife, but only a son, the son is liable to pay the deceased's debts, as a spiritual and legal obligation. But, if the son has wealth of his own (though not inherited from the father) and is more affluent than he who takes the widow as his mistress or wife, he takes precedence of the taker of the wife in liability to discharge the debts. Among sons, if some are unfit to inherit through physical or mental defects, the sons who are not so disqualified to inherit, are liable for the payment of the deceased man's debts. The *Vaijayantī* explains the rules of Viṣṇu thus: the word *grāha* applies to both *riktha* (property) and

ycṣid, and in the latter case, it means a son who is married as contrasted with one who is not. The order of liability is the *rikthāgrāha* son, the *yoṣidgrāha* son, and the son who has neither wife nor son, as the wife is the dead man's sole surviving asset. Dr. Ganganath Jha (*Hindu Law in its Sources*, I, p. 211) states that this rule refers to cases of distillers of liquor and others, who have been notorious as making money by allowing their wives to be used by other men. Asahāya (p. 320) explains the position thus: "If the woman (*i.e.* the widow) is endowed with youth and beauty and if her new lover is infatuated with love for her, he who takes her (*strīhārī*) must pay the dead man's debts, as she was his wealth; but, if she is unfit to be enjoyed as a mistress (*nirbhogyā*) and is used as a servantmaid by him who takes her, and feeds her in return for work, the liability to pay the debt rests on the son and he should discharge the debt." Dr. Kane (*Hist. of D. S.*, III, p, 453) points out that the rule has been changed by legislation in Bombay by Bombay Act VII of 1866, section 4, which declares that "no person who has married a widow shall merely by reason of such marriage, be liable for the debts of any prior husband of such widow." Lakṣmīdhara (p. 322) explains the rule of Yājñavalkya (II, 51) that the last persons liable for the payment of the dead man's debts are "*rikthinaḥ*", as grandsons fit to inherit the estate (*rikthagrhaṇayogyāḥ pautrāḥ*. p. 322). Women may be taken on by other men, when their husbands have gone on long journeys and are not returning, or are idiots, or insane or afflicted with incurable disease or have joined peculiar sects (*liṅginām*) along with the wealth of such men; in such cases the *yoṣidgrāhī* should pay the debts of such persons, even if they are alive. (Kātyāyana, p. 323)

Ways of Recovering Debts (Ṛṇodgrāhaṇavidhi)

Recovery of a debt by the process of a suit is the regular method. But debts may be got back in other ways which though not strictly legal are still allowed by smṛtis. Manu (VIII, 48-49) notes that the creditor may be able to get the property of the debtor, (in return or in security for the debt) in other ways than by a law suit, *e.g.*, by moral persuasion (*dharmeṇa*), by a trick (*chalena*) or by customary ways (*caritena*), or by force (*balena*). Bṛhaspati adds two other ways: by expostulation with the debtor (*sāmena*) and by confining the debtor in his house (*gṛhasamrodhanena*). Kātyāyana suggests pressure on the debtor, as by fastening his house door to prevent his getting out, or practising the custom of squatting at his door (*dhāraṇa*), or making his wife or children do so, till the debt is repaid. Or, he may make the debtor pay off the debt by working for him. Putting pressure on debtors (who are traders, cultivators or artisans) in customary ways (*deśācāreṇa*)—*i. e.* by applying force, is another method. The debtor may be beaten (*tāḍanāt*), according to Bṛhaspati (p. 325) till he repays the debt. The restrained debtor may be allowed to have

his meals only when he finds a temporary surety to relieve him for meals, the surety remaining in custody till the return of the debtor : or the debtor may be gaoled, if he is not of respectable birth (*ārya*), and not generally trusted (p.322). The debt can be repaid by labour, if the debtor is of a lower *varṇa* than the creditor. A brāhmaṇa debtor, who is bankrupt, must be allowed to pay back the debt slowly. If such a debtor is made to do low kinds of labour, the creditor will be liable for the highest fine (p. 337) and the debtor subjected to the indignity released by order of the king (p. 327). The debtor's chattels can be sold to recover the amount lent (p. 329). A creditor must not be blamed, says Yājñavalkya, for attempts to recover his own lent money (p. 329), and a debtor who complains of such an action to the king must be fined (p. 330), one quarter of the debt amount. The rules concern *admitted* debts; where debts are denied the only recourse is to go to the law courts (Bṛhaspati, p. 330), When a debtor wishes to have the matter taken to court, but is coerced by the creditor instead, the latter will lose the amount lent (Kātyāyana, p. 330), as in doubtful cases of debt the matter must be settled only by a suit (p. 335).

Such methods of recovery may seem harsh, but comparatively they are milder than the rules in other times and countries. In England imprisonment for debt might be prolonged for years. In India, there is a timelimit. In India, there is a timelimit. In England a judgment debtor can now be imprisoned for 42 days (Kane, III. p. 440). The methods described could not have been applied on debtors to make them repay the debts, unless supported by public opinion. In early Roman Law (XII Tables,) a debtor who defaults could be sold into slavery or be even put to death.

The high rates of interest reflect the scarcity of capital in ancient times, when the rules were laid down in smṛtis or the high profits that the utilisation of borrowed money might earn in agriculture, industry or trade. But the money-lender, especially he who lends on compound interest was deemed as degrading himself.

Law of Deposits (Nikṣepa)

Nikṣepa is the general name for deposits. It denotes what through confidence in a man's rectitude is placed in his hands by another. It may be immoveable property or movables. It may be done for safeguarding the property, when a man is leaving his place or for the purpose of deceiving the king or heirs (Vyāsa).

It is divided into *five* kinds *viz. nikṣepa* proper or open deposit, when after checking up it is handed over to the depository himself by the depositer: *upanidhi* or sealed deposit, when a property is handed over in a sealed box, without disclosing the contents to the depository: *nyāsa* or a deposit handed

over not directly to the depository but in his absence to a son or relative, with the request that it should be delivered to the depository proper: *yācita* or borrowed article, like jewellery, and *anvāhita*, or a deposit made over by the depository to a third party for being delivered to the owner.

Yājñavalkya (II, 67) rules that the rules relating to *nikṣepa* are equally applicable to all the five kinds of deposits.

A deposit should be given back in the same manner (*i. e.* openly or secretly) as it was received by the depository (Nārada, p. 340) : as the delivery was, so must be the return (Manu, VI, 180) openly or secretly, as the case be. It must be returned in the same condition as it was in when deposited (Bṛhaspati, p. 341). A deposit, open or sealed, must not be returned to a near relation of a depositor, when the latter is alive (Manu, VIII, 185) ; for, if this man dies without handing it over to the original depository, the deposit will be lost. The depository must make good the loss of the article deposited or pay damages, unless the loss or depreciation is due to an act of God or of the King. If the depository has not taken any part of the deposit himself, but it is lost by theft, or in a flood or in a fire, the depository cannot be asked to make good the loss (Manu, VIII, 189, p. 342). The depositor takes the risk if he makes the deposit knowing its chances of loss (p. 343), as what is lost through the negligence of the depository must be made good by him (Kātyāyana, p. 343) with interest (p. 344). A deposited article must not be used by the depository, or made to earn him a profit (*Nārada*, p. 344). Both the depository who fails or refuses to return an article deposited with him, and he who falsely claims a deposit that was not made, should both be fined twice the value of the article, and punished as thieves (*Mātsyapurāṇa*, p. 345). It should be returned at a proper time. A depository *may be tried ex parte* when he is charged with not returning the deposit (Manu, VIII, 182). Negligence leading to loss of deposit makes the depository liable to make good the loss (p. 349). A borrowed article must be returned on demand, even before the time of return originally agreed upon (p. 348). If a *nyāsa* in the hands of an artisan is partially damaged, the loss must be made good by him but it falls on the depositor if he delays taking delivery when asked to do so (p. 349). Damage to an article handed to an artisan to be worked up must be made good, even if it is through *vis major*, or Fate (*daivahata*). The sin of losing or damaging a deposit is said to be equal to that of a woman who injures her husband or of a man who kills his own son (p. 340). One must be careful therefore in taking charge of deposits. One is not bound to accept a deposit. A deposit (*nikṣepa*) is a bailment in trust. It is not given, like *ādhi* as a security for a loan, but it is given for safe custody by reason of trust in the honesty of the depository.

The rule of Kātyāyana (p. 349) that *he alone* by whose negligence the article deposited with him is lost or damaged is liable to make good the loss,

(*dāpyaḥ sa eva tat*) shows that the liability is not passed on to sons and grand-sons, as in the case of the *ādhi* or a security, unless they have joined or helped in the embezzlement or loss of the article deposited. A deposit is not to be returned by sons and others (*Vivādacintāmaṇi*, p. 26).

Sale Without Ownership (*Asvāmivikrayaḥ*)

The sale of anything by one who is not its owner is termed *asvāmivikrayaḥ*. It forms a *vyavahārapada*. The four kinds of deposits, which are placed in the hands of a depositary, *e g. nikṣepa, anvāhita, nyāsa* and *yācita* are among those in which he has no property right. A lost article that is found by a man, or a thing which is stolen also come under this category. A gift (*dāna*) by one who is not the owner of the thing gifted away will also come under this head.

A depository who sells a thing deposited with him is of course guilty. But one who sells lost property picked up by him, the owner of which is unknown to him, is acting in good faith.

When a thing has been sold by one who is not its owner, the real owner can obtain it from the purchaser (p. 353, Nārada, X, 2). In such a case, when the fact that the article that has been sold by him is not his property is brought to the notice of the seller, he must try and find the vendor from whom he had bought it. It is only by discovering and producing this vendor that he will clear himself of guilt (*kretuḥ śuddhiḥ tato bhavet*, p. 350). The vendor should be produced before the Court, and time for doing so will be given to him, according to the distance of the place where the vendor lives (p. 351). He should also establish that his purchase of the article from the vendor was overt. When the vendor is produced and apprehended, the seller of the article that was bought from this vendor is no longer liable (p. 351). The judge will sentence the original vendor to a fine, and order him to pay the price of the article and a fine to the purchaser, who must restore it to the real owner (p. 351). If the offending vendor is a kinsman of the owner of the lost article he will be fined 600 paṇas (Manu, p. 352). The buyer of the article from the vendor must establish his having bought it publicly from him, in the open market and before witnesses. Then alone will he be cleared of guilt; otherwise he will be regarded 'as a thief'. If he establishes his open purchase as above, his good faith is established and he will be discharged but he must restore the article to the real owner (p. 352).

The owner of a lost article must also establish his right to it by witnesses, who may be kinsmen, and he must prove that the article was not donated, or sold or abandoned by him (p. 353).

A gift or sale or pledge by one who is not the owner is to be rescinded (Kâtyāyana, p. 353). He who fails to establish his title to an article indicating also the source of acquisition that has been sold by another to a third

person should be 'deemed a thief' and punished (p. 353). The buyer of the article from whom the owner claims it should establish his *bona fide* purchase of it. If his sale is also open and in good faith, he is not blameable (Viṣṇu, 354). A purchase made in secret, or for far less than the value of the article, or from a slave, or from a known rogue, or at an unusual hour will be regarded as fraudulent, and both he and the person from whom he bought it so will be punished as thieves (p. 355). The real owner of the property can get it back after paying half its price to the person who had bought it, and from whom he now recovers it, as each party must lose something for his negligence (p. 356). Purchase from an unknown vendor as well as negligence which leads to the loss of the property are both faults for which one must be made to pay (p. 356). The loss shall thus be equally borne both by the original owner and the purchaser, who establishes his overt purchase (Marīci, p. 357).

The seizure of a lost property by its owner from a stranger without notice to the 'king' is culpable and will entail a fine of 96 paṇas of copper (Yājña-valkya, II. 172).

If a relation of a rightful owner sells a property of the owner, he shall be fined 600 paṇas, and the purchaser also will be fined the same amount if he has bought it with knowledge of the facts (Manu, VIII, 198).

LAW OF JOINT CONCERNS (*Sambhūyasamutthānam*)

This section deals with the law of partnership. Joint concerns may be religious or secular, or even of persons engaged in acts which would be termed now criminal, like dacoities committed in adjacent states by organized bands of robbers, who bring the plunder to their own country (p. 371). In such a case what is unlawful from the standpoint of the robbed country is not regarded so in that to which the robber band belongs. The pillages may be perpetrated in enemy territory (*pararāṣṭra*) and be authorized by the state to which the pillagers belong. Such organized pillage is often by soldiers. Kātyayana assigns to the king a tenth part of the loot brought in by the gang (p. 371). Such gangs are divided into four classes, *viz.* the chief, who received four shares in ten, out of what remains after paying the king a tenth of the loot, the bravest three shares in ten, the most active two shares in ten, and the common members one tenth of what remains (p. 372). If one of the robber or raiders is taken prisoner and has to be ransomed, the amount of the ransom should be recovered from the rest in equal shares (p. 372).

Sacrificial Priests

Gautama, Āpastamba and Baudhāyana are silent on civil partnerships, and even Manu (VIII, 206-210) lays down rules only about the distribution of fees among sacrificial priests, and rules that the same principles be applied in

all joint concerns, each being paid according to the importance of his work in joint task (VIII, 211). While Manu extends the rule in a religious rite to secular partnership, Yājñavalkya (II. 265) reverses the rule and extends to sacrifices the rules of partnerships among traders, husbandmen and craftsmen.

Dr. P. V. Kane (*History of Dharmaśāstra*, III, p. 470) regards this as indicating that "complicated sacrifices requiring a large number of priests had become rare in Yājñavalkya's time and partnerships of traders and artisans had assumed great importance." The inference may be questioned, as we have numerous recorded instances of the performance of great sacrifices like the Aśvamedha in the epochs near that to which Yājñavalkya is usually assigned. From 200 B.C. to the eighteenth century many horse sacrifices were performed of which there are records (see his *History of Dharmaśāstra*, II, 1238-1239). The Sātavāhanas, Pallavas, Guptas and Bhāraśivas claim to have done many of them, and recently Mr. T. N. Ramachandran, Joint Director-General of the Archaeological Survey of India, has discovered in Dehra Dun district sites where King Śilavarman (3rd century A.D.) performed many horse sacrifices, of which the remains have been unearthed by him.

Sacrificial Priests

A verse attributed by *Smṛticandrikā* to Manu (p. 436) states that when a number of priests (*ṛtvijaḥ*) officiate at a sacrifice (*satra*) each will do the duty assigned to him and receive the fee prescribed for it. Out of the sixteen priests who officiate in a *yāga* or *satra*, the chief four receive one-half the total amount set apart for fees (*dakṣiṇā*). They are the *hotṛ*, *brahmā*, *adhvaryu*, and *udgātṛ*. The next group of four priests (*maitrāvaruṇa*, *brāhmaṇācchamsi*, *pratiprastrathātṛ* and *prastotṛ*) receive one-half of what the first group gets. The third group of four priests (*acchāvāka*, *neṣtṛ*, *agnīdhra* and *pratihartṛ* receive one-third of what the group gets; and the fourth group (*grāvastotṛ*, *potṛ*, *netṛ* and *subrahmaṇya* get one fourth of what the first group gets. The total taken is not given by Lakṣmīdhara (as pointed out in the footnote on p. 365 *inf.*) but Medhātithi takes it as 112 and the others as 100. Over and above these the *adhvaryu* receives a chariot, the Brāhmaṇa at the kindling of the Fire a horse, the *hotṛ* also a horse and the *udgātṛ* gets the cart used to bring the *soma* purchased. The specific fees prescribed for special sacrifices like the *Rājasūya* are to be paid to the officiating priest in lieu of those prescribed, as above, *e. g.* two golden ornaments or mirrors (*prakāśa*).

If an officiating priest has to absent himself a substitute should be put in and paid the same fee. If an officiating priest stays away wilfully, he is to be fined 100 *paṇas* or even 200. A sacrificer who gives up an engaged priest shall also be fined similarly (pp. 367-368).

Joint Concerns in Business

Bṛhaspati (p. 358) advises a person to join others in a concern only if he is satisfied with their character and capacity. Each partner should contribute his share and the profits will be divided according to the shares. This is the ordinary rule, but by a special agreement one may get more than what he is entitled to according to his shares (Yājñavalkya, p. 359). The cost of working the concern must be met by each partner out of his income, as agreed upon. A partner suspected of fraud must be cleared by an ordeal (p. 360). Negligence by a partner which leads to loss must be borne by himself only, out of his share. A partner who saves by his skill the property of the concern from calamities like robbers or floods, should receive one-tenth of the gains, the remainder being divided among the partners according to their shares. A dishonest shareholder may be dismissed by the others. If a shareholder meets with a misfortune or accident, his heirs shall take his place, provided they are competent. On the death of a partner his shares must be made over to his heirs, or the king should keep them for ten years.

The king shall take a sixth part of the property of a Śūdra shareholder, whose heirs are not forthcoming, a ninth part of that of a Vaiśya, and a twelfth of a Kṣatriya, but none from that of a Brāhmaṇa, which after three years must be given away to Brāhmaṇas (p. 369). The period for which the king has to wait the arrival of a claimant for a deceased's estate is proportioned, as pointed out by Colebrooke (*Digest of Hindu Law*, 1801, II, 29) to the time needed for the heir from a distant country to appear and make his claim. Nārada holds that Dharma does not suffer by the king taking over heirless property (VI, 18).

Joint Undertakings in Agriculture

Joint undertakings in agriculture should be undertaken only with equals in means, knowledge and experience. Loss due to the negligence or inability of one partner, must be made by him.

Joint Undertakings among Artisans

The associates may be workers in metals, thread, wood, stone and leather. The earnings should be divided according to the work done by each. Artisans are of four grades: the apprentice (*śikṣaka*), the trained artisan (*abhijña*). the expert (*kuśala*) and the master-craftsman (*ācāryaḥ*)—Kātyāyana (p. 371). They shall receive one, two, three and four parts respectively of the remuneration received for the work done. The headman in a group engaged in building is entitled to a double share (p. 371).

Artists

Among musicans in a band, the time-keeper takes a share and a half, and the others one each (p. 371).

RESCISSION OF GIFTS (*Dattāpradānikam*)

When a gift has been made unwisely (*asamyak*) or in an improper manner and the donor desires to resume it, it is called *dattāpradānikam.* (Nārada, VII, 1). Things may be classed as those that can be donated and those that cannot (*deya, adeya*), or given away or not given away (*datta, adatta*). Nārada notes that things that cannot be given away are of eight kinds and of only one sort that can be donated; and of things that are given away (*datta*) there are seven kinds and of those not so given twelve (or sixteen, according to a different reading) sorts.

What should not be given (*Adeya*)

Bṛhaspati (p. 373) notes that the *eight* kinds of things that one cannot give away are: what he holds in common with others (*sāmānyam*), a son, a wife a pledge (*ādhi*) one's whole property (*sarvasvam*) a deposit held by him (*nyāsa*), what has been borrowed by him (*yācita*), and what has already been promised to be given to another person (*pratiśruta*). *Sāmanyam* is interpreted by *Smṛticandrikā* (p. 442) as *public* property, like roads. Nārada holds that these cannot be given away even when one is in distress. The gift of a man's entire property is barred when he has progeny (*anvaye sati,* p. 374). Along with the giving away of a wife the gift to another of her property is also barred (*dārāśca taddhanam,* p. 374).

Smṛticandrikā (p. 442) holds that the giving away of one's entire property is barred only when he has offspring (sons, grandsons etc.) living with him jointly. If he has already given them their shares and separated from them, he may give away his entire remaining property. On the other hand, some writers (Vācaspati Miśra and *Smṛtisāra*) hold that the prohibition of giving away one's entire property is not opposed to law, as a man has absolute ownership in it, and that the prohibition is moral rather than legal. The *Mitākṣarā* states that the consent of the sons is enough for giving away the entire property, and thereby implies that the consent of grandsons is not necessary to validate it.

Giving away a son is in adoption.

The prohibition is held to refer to giving away an *only* son, or the *eldest* son. Giving away a wife or son is qualified by Kātyāyana by the expression 'if they are not willing' (*anicchavaḥ*), p. 374. Vasiṣṭha (p. 375), who forbids the gift of an only son or its acceptance, explains the spiritual ground of the prohibition that the son must live to continue the line (and the offerings to ancestors).

A woman is also prohibited by him from giving away her son. Bṛhaspati excludes from the property that a man can give away what is needed for food

and clothing of the members of the family, and Kātyayana excludes from it the family house also (p. 357). A marriage gift (dowry) cannot be given away (p. 375), without the wife's assent (p. 376). Even a promised gift need not be made if the donee is found to be a sinful or vicious man (*adharma-yukta*, p. 377). Rewards promised for rescue in times of fear, or for getting a thing done, or out of gratitude generally, or wages for discovering property and rewards for saving one's life when it is in danger are all valid, but even in the last case, the gift of the whole property is invalid, even if it had been expressly promised (p. 378). Promises of gifts made in panic, or under pressure, or when drunk or insane, or in joke, or under a misapprehension need not be implemented (p. 379). A gift for an immoral purpose is invalid (p. 379). The donor and the donee in cases of invalid gift are punishable by the king. So is a bribe (*utkoca*) which though promised need not be given, after the service for which it was promised is rendered. The recipient of a bribe and the intermediary through whom it is given are punishable but not the promiser, probably on the presumption that it was fear that made him agree to give it. Anything given for a gift in return, or to a bad man, or for an immoral purpose may be taken back (p. 379). If a gift for a pious purpose is promised, and later on it is found that the object is not correct or it will not be used or has not been used for the purpose, it can be held back, if not given, or if given, taken back. (Manu, p. 380). If a dying man has promised a gift for a religious purpose, his son must give it, if the father dies before it is given away. This is held to contain the idea of an inchoate Will. A gift promised to a Brāhman and not made will be enforced by a fine (Kātyāyana, p. 377).

He who accepts what should not be a gift and he who makes it will both be punished by the king (Nārada, p. 380). If a man promises a gift and does not make it, the king should fine him a *suvarṇa* (*Matsyapurāṇa*, p. 377). Hārīta (p. 377) holds that a gift has a legal and spiritual backing, and he who having promised a gift does not make it goes to different hells and is reborn as an animal. What has been promised to a worker as wage, (*bhṛti*) or out of satisfaction (*tuṣṭyā*) or to bards for the pleasure given by their songs, or to merchants, or to a woman as *śulka*, or to a benefactor in gratitude *must* be given. Gifts to parents, friends, suppliants disabled and helpless persons, eminent and virtuous persons and benefactors, are fruitful (*saphalam*) of spiritual gain. They must be made (p. 378).

LAW OF WAGES (*Bhṛtividhi*)

Three divisions of the law relating to wages are followed in smṛtis, each forming a head of *vyavahāra*. These are (1) the law relating to wages (*bhṛtividhiḥ*) or remuneration for labour, (2) breach by workmen or employee of

contract of service (*abhyupetya aśuśrūṣā*, (3) disputes between the owner of cattle and herdsmen (*svāmipālavivāda*).

Servants or servitors (*karmakarāh*) are free workers, while slaves (*dāsāh*) are not. The former are divided into four classes and the latter into fifteen. Servants may also be classified in many ways according to their caste and occupation (Bṛhaspati, p. 382); but the four-fold division of those who serve deals with the chief of them. One may serve to attain sacred knowledge (*vidyā*), or knowledge of a skilled craft (*vijñāna*), or be a mere worker or a common wage earner. Each class is subdivided into sections according to differences of occupation and their requirements. The typical members of rhe four classes are a student under a *guru*, studying the Vedas, an apprentice learning a trade or craft under a master, a hired worker, and a supervisor of workers (*adhikarmakṛt*).

The relations between teacher (*guru*) and pupil, during the long term of pupillage have been dealt with in the *Brahmacārikāṇḍa*. The pupil has to reside with the *guru*, as a member of his family, pay obedience to him, and diligently attend on him, as well as on the guru's wife and sons. After completing his studies, he must make his *gurudakṣiṇā*, get the preceptors permission to leave, and leave.

Crafts and arts (goldsmith's work or dancing for example) are termed, in contrast with *vidyā* (Vedic learning), *vijñāna* (skill). The student in this case too should live with his teacher as a member of his household, for a stipulated period, during which he will be trained in his work. The master craftsman will feed the pupil (apprentice) and teach him. He will be treated like a son, and not be put to any work other than that for which he is being trained (Nārada, p. 384). If the master does not teach the apprentice his craft but exacts other work from him, he is liabde to a fine of the first degree, and the pupil will be allowed to go away from him. If the apprentice forsakes or disobeys a good master, he will be compelled to reside and obey, and may be flogged or detained (p. 384). Even when his training is finished, the pupil must remain for the full stipulated period with the master, and his earnings will go to the master, while he will work without wages (*bhṛti*). When the period of stipulated training is finished, the pupil or apprentice will leave his master after liberally rewarding him and showing him honour, according to his capacity (p. 385).

The servitor, who works for wages (*arthabhṛt*) may be engaged for wages payable by days or months, *i. e.* by time, or for a share of the gains of the labour. The highest worker is a skilled worker with tools, the next is a cultivator (*kṛṣīvala*), and the last a mere carrier of burdens. The division

is based on skill. The last class is to do household work. The second class consists of agricultural workers, cowherds etc, who are remunerated from the harvest or milk gained from the cattle.

The highest type of servitor is he who is to do the work of the manager of the property, and is termed *kauṭumbika*. The four are to work on " pure ", *i.e.* non-degrading work. Scavenging, shampooing the private parts of the master, removing leavings of food etc. should be done by slaves or the children of female slaves (p. 387).

Classification of Slaves

A slave may be one purchased as such, or born a slave, or got as a gift from an owner or bought, or inherited along with family property, or admitted to servitude in return for food during a famine, or pledged by a former owner, or reduced to slavery for debt or become a slave by voluntary surrender to a master by offer to be a slave, or one enslaved for a stipulated period, or self-sold or become a salve for maintenance, or the son of his connection with a female slave. An apostate from ascetic life (*pravrajyāvasitaḥ*) becomes the slave of the King (Nārada, p. 389.). He is entitled to emancipation neither in this life nor *mokṣa* (release) after death. Lakṣmīdhara cites without comment the cryptic verse of Manu (VIII . 414) stating that the Śūdra is not released from servitude though released by his master from it. As pointed out in footnote on p. 389 this verse is held by Medhātithi to be merely declamatory (*arthavāda*) as even a Śūdra slave can be emancipated. The Śūdra belongs to one of the four *varṇas* and is an Aryan (see my INDIAN CAMERALISM, 1949, p. 84), and, according to Kauṭilya " no Aryan is born a slave ". The duty of service is hereditary for the Śūdra and the verse simply means that no Śūdra can give up this duty.

The penalty for a Kṣatriya or Vaiśya ascetic, who forsakes his order is servitude (*dāsatva*), while for the Brāhamaṇa ascetic who forsakes his order, the penalty is expulsion from the country after being marked with a dog's foot branded on his forehead (p. 390).

Emancipation from Slavery

Persons sold as slaves by robbers who have captured them will be set free by the King (p. 391). A slave who saves his master's life at the peril of his own is set free automatically and gets a son's share of the estate (p. 391). One reduced to slavery in a famine is set free by the presentation of a pair of oxen. One who has voluntarily become a slave for maintenance is freed by giving it up. One enslaved for sex-intercourse with a slave girl is released on separation from her (p. 391). A slave woman, who becomes pregnant by intercourse with her master, is set free when she gives birth to a child and along with it,

The procedure in emancipation is this. The master takes a pot of water from the shoulder of the slave, sprinkles the water on the head of the slave, and smashes the pot. Besides water the pot must contain grain (unhusked) and flowers. He should declare three times that the slave is freed. The slave should then proceed eastwards.

The wealth of a slave belongs to his master, who is however not entitled to the price paid for turning him into a slave (p. 394). A free woman becomes a slave by marrying one (p. 395). Slavery is not synonymous (p. 396) with *prātilomya* (inverse order of marriage). A Brāhamaṇa cannot be a slave (p. 396). The highest penalty should be imposed on him who makes one of a superior *varṇa* do a slave's degrading work (Viṣṇu, p. 398).

A person who buys a Brāhmaṇa woman or sells her as a slave will be compelled to annul the transaction and be fined. If a respectable woman seeks shelter under a man, and he sells her as a slave to another, he will be fined and the transaction annulled (p. 398). If a man enjoys a free woman, either his child's nurse or his servant's wife as if she were a slave woman, he must suffer the first emercement (p. 399). If a solvent man sells a slave woman, whom he has enjoyed (*bhuktām*), when she is unwilling to be sold, he should be fined two-hundred (Kātyāyana p. 399)

Kātyāyana points out (p. 396) that members of the four varṇas can be slaves only of those of varṇas higher than their own, or of their own *varṇa* and not of those below them in *varṇa*. This refers to the different ways in which a person might bring himself into servitude. A well-to-do Brāhamaṇa may support men of the next two varṇas when they are destitute and have no means of living, but they must be put only to suitable tasks, and if he puts them to do low work (like cleansing the house or latrines) the king should impose on him a fine of 600 paṇas (p. 398).

Non-payment of Wages (Vetanasyānapākriyā).

A servitor should be paid by his master or employer, as agreed upon before-hand, either at the beginning of the month (*i.e.* in advance), or in the middle of the month or when the month is over. The wages may be fixed before-hand, but when not so settled the servant of a trader or of the owner of cattle who engages the servitor as herdsman, and a field labourer shall get a tenth part respectively of the milk yielded by the cows or harvested grain respectively. Yājñavalkya (II, 196) correctly rules that wages should depend upon the work turned out, and when the work turned out is either late or imperfect or incomplete, the amount to be given as wage is within the discretion of the employer. The customary rule, which is embodied in smṛti, is that an agricultural labourer, a ploughman (*sīravāhaka*) should get one-fifth of the grain, if he is fed also,

and one-third of it otherwise, should a definite engagement regarding wages not have been made (Bṛhaspati, p. 401). In earlier days a ploughman who ran away was asked to be thrashed (Āpastamba, p. 402). The practice must have disappeared later. An agricultural labourer is responsible for the safe custody of the implements he handles (Nārada, p. 402). A labourer who fails to do his work, though able to do it, forfeits his wage, and has to pay to the king a fine of twice the wage (Bṛhaspati, p. 403). A workman can be legally compelled to do the work undertaken, and paid the wage for it agreed on. A workman who leaves his work unfinished can be fined and compelled to complete the task (p. 404). He can also be fined eight *kṛṣṇalas*. Wages in full cannot be claimed for incomplete work. A workman who stops work in the middle of a stipulated period can be compelled to finish it, unless he desisted from a fault of the employer (p. 405). If at fault he can be made to complete the work and also pay a fine of 100 paṇas to the king. A wage-earner is entitled to the full wage agreed upon when engaged, if he is sent away before the work is finished. The employer in that case will be fined 100 paṇas. A servant is to pay the full value of what is lost by his inattention and twice the amount if the loss is due to gross negligence or malicious intent. He has not to make good losses by robbery, or by 'acts of God or the King' (p. 405).

He, who, having agreed to do for pay a task of art or science (*śilpa, vidyā*) is paid the wage therefore, but fails to perform his task, will be fined the full amount (p. 406) promised.

As regards the hire of conveyances or animals used for carrying persons or articles, merchandise damaged or lost by the carrier's fault has to be made good by him (p. 405), but not if they are due to God or the king (p. 406). A trader who hires a carrier but drops him must pay him a fourth of the promised hire (p. 407), and the whole hire, if after using the conveyance, he dismisses it halfway. A carrier who abandons the merchandise shall forfeit a sixth part of his hire. When the conveyance is stopped halfway and robbed of its contents, the carrier should get proportionate hire according to the distance covered (p. 407). The same rule applies if the articles carried are confiscated on the way (p. 407).

The employer is responsible for the health of the person hired. He who abandons on the way a sick or exhausted (*śrānta*) employee, without remaining with him for three days and taking care of him shall pay the first amercement.

Failure by an employer to pay the stipulated wage will make the king compel its payment and punish the employer (p. 408).

Laws relating to Prostitutes (*Paṇyastrīvidhiḥ*)

Prostitutes were a recognized professional class, and were even regarded as forming a 'fifth caste'. In Mauryan India they were the property of the

king. Kauṭilya (p. 123) mentions a 'Superintendent of Prostitutes,' appointed by the king. Nārada is cited by Lakṣmīdhara (p. 410) for a rule making the Chief Prostitute (veśyāḥ pradhānā) decide disputes relating to them. Kauṭilya states that a prostitute was to give the king every month twice the amount earned by her on a day. Smṛtis and Purāṇas treat the prostitute as a social institution and frame rules for their wages.

A prostitute who has received her hire but refuses to attend on the payer will have to pay twice the amount to him, and an equal amount to the king, unless she is unable to attend on him through illness, weariness, or fear (p. 408). Unnatural intercourse with a prostitute or hurting her during intercourse makes the paramour liable for the payment of *eight* times the promised fee, and an equal amount as a fine to the king (p. 409). A fine of a gold *māṣa* will have to be paid by the go-between who engages a prostitute for one person and takes her to a different man. Failure to pay the promised fee will make a man liable to pay her twice the amount and a fine equal to this to the king (p. 410). When several persons use a woman, each will have to pay her a double fee, and to the King also the same (p. 410).

Payments for Use of Houses etc. (*Gṛhādibhāṭakavidhiḥ*)

The rent for the use of a house or ground is treated like wages. If one has built a house himself on a ground belonging to another, paying rent (for the ground) to the owner, he may take away the materials out of which the house was built, when he vacates it (Nārada, p. 411). But if he has lived there without the owner's permission and without paying him rent, he cannot do this (ib.). This is also the rule if a man gets a ground on which he builds the house through friendly consideration of the owner *i.e.* without rent. Hiring a house or a water-vessel or such things from the owner will make the hirer restore them to the owner and pay rent for them till he leaves (p. 411). Damage done to articles taken on hire must be made good by the hirer (Nārada, p. 412).

He who hires a cart and goes away after using it but without paying its hire (*bhāṭa*), when he has covered only part of the road he had undertaken to take it over, will have to pay the *full* hire (*Vṛddhamanu*, p. 412). The same rule applies to hiring animals for conveyance—*e.g.* elephants, oxen, horses, mules or camels—and the hirer will have to pay the full hire, even if they have been used only for part of the road (Kātyāyana, p. 412).

Owner and Keeper of Cattle

Disputes between the owner of cattle and the persons he employs to look after the cattle are treated in the last section on Wages. It is termed *svāmipālavivāda.*

The wages of the herdsman are customary. A cowherd may be paid money or milk, the latter being more usual. He gets the milk of the best cow, if he gets nothing else as remuneration. For grazing and lending a hundred cows for a year, he will get a heifer as fee ; for tending two hundred cows, he will get a milch cow. He will also be allowed to milk for his own use all cows every eighth day (p. 413). Bṛhaspati rules that he gets the milk of one cow every eighth day. Āpastamba enunciates an old rule that a herdsman who neglects his herd is to be flogged (p. 414). He is bound to bring the cows back home in the evening in good condition after they have grazed. If any have been seized (by wolves) or lost (as by falling into pits), through his negligence, he must pay their value. (Yājñavalkya, II, 164) He is not responsible, if after notifying the danger to the owner, some of the cattle are taken away by robbers (p. 415). In cases of confusion as when the village is over-run and also the district, the herdsman is not responsible for loss of cattle in his charge (Vyāsa, p. 415). The herdsman should, as far as possible protect the cattle from insects, snakes, tigers and robbers. Negligence on his part makes him liable to pay the price of the lost animal. (p. 416) and a fine of 13½ paṇas. Milking cattle without permission (and appropriating the milk) makes a herdsman liable to a fine of 25 kārṣāpaṇas.

Goats attacked by wolves (as well as sheep) and killed will make the herdsman responsible for their loss, unless he has honestly tried to repel the attack. Sudden attacks by wolves will not make him responsible for loss.

When cattle die in the forest, naturally or by attacks, the herdsman should take their ears, tails, hides and skin to the owner, obviously to prove that they died, and were not clandestinely sold away (p. 418).

Transgression of Agreements (*Samvid-vyatikramaḥ*)

The expression *samvid-vyatikrama* is used by Manu (VIII, 5) in enumerating *vyavahārapadāḥ*, and again when he had dealt with non-payment of wages and proceeds to the next topic he describes it as that which deals with those who break *samaya* (*samayabhedinah*) (VIII, 218), and Kullūka makes *samaya* the equivalent of *samvid* in explaining the verse. *Samaya* means 'convention' and *samvid* is 'compact'. The former in practice (in corporate bodies) leads to the latter. Yājñavalkya (I, 61) uses *samaya* in the sense of 'agreement,' which must be the basis of both. Nārada (p. 419) refers to the rules made by agreement among themselves by heretics as well as orthodox followers of the Vedas as *samayāḥ*. An agreement among members of a group is termed *samayakriyā* (p. 423).

The formation of groups of persons with common interests or traditions or outlook is desirable for their safe existence and progress. It is for this reason that the king is enjoined, as his duty, to protect their rules and practices, so long

as they are not against Dharma (*avirodhena dharmasya*, p. 423 or *nijadharmā-virodhena*, p. 422), and to punish those among groups who violate their agreement or create disorder or disunion. Such groups are also necessary to safeguard their members' interests or of those of the community especially in times of peril, as for instance in an enemy attack or invasion, or attacks (*bā-dhā*) by robbers (p. 420). Groups make better progress than individuals. The recognition of this principle is behind the rules enjoining the king to approve of the constitution and working of even associations of renunciates who have given up their vows (*pākhaṇḍāḥ*) or (to take the interpretation of the *Mitāk-ṣarā*) those who do not accept the authority of the Vedas like the Jainas and Bauddhas. Nārada mentions among the groups which the king must recognize, guide and control, guilds of traders and corporations, unions of soldiers (*vrāta*), and unions of kinsmen, showing that what is desired is their efficiency and strength and not conformity to one religious standard. The king must maintain in each group its settled or agreed usages and rules, including the modes of their working and constitution. The general principle that must be enforced is that whatever are the agreed rules of a corporations must be strictly followed and enforced. In addition, they must obey the commands of the king (p- 422)

Examples of the compacts (*samaya*) of a corporation are given on p. 423. They include agreements to build temples, halls of assembly, refreshment rooms, and to dig tanks, arrange for sacrifices, or mutual defence, and for poor relief. They should be implemented by the association and enforced by the king. One who refuses to carry out the agreement of the group, while remaining a member, will be punished by the king with the forfeiture of his whole property, or banishment, or, in milder cases, by a fine of 24 suvarṇas (p. 423). Changes in their constitution or rules (*bheda*) require royal approval.

In an association there should be a leader (*kāryacintaka*) and committees of five or seven members (p. 420), who should be chosen for their capacity, experience and character, as well as their ability to speak for the good of the *samūha*. People who sow dissension in corporate bodies should be subject to specially severe punishment by the king (p. 424). Among offences that the king should punish are misuse of the group's funds, their misappropriation (for which banishment is the penalty advised), or wastes of its resources (*gaṇadra-vyavināśakah*, p. 425). Commensality among the members of the union must be enforced (Kātyāyana, p. 426).

After meetings of union councils, its members should be sent back after honours being conferred on them by the king, as they are public workers.

The incomings of any member should go into the common stock, to be divided among all members ; or, when it is not considerable, it may be used for charity. Debts incurred by managing members, as if for the union, but used

up by themselves must be repaid by them to the group. A person who joins the group after it has been long in existence is equally entitled to the privileges of membership as older members. One who has resigned from the group loses them.[1]

Repentance of Purchase and Sale

After a sale is effected, it may happen that both the seller and the purchaser, or either may be dissatisfied, and may want back the article or the sale-price paid respectively. The rules are allied and Manu (VIII, 232) treats both under one head, ' repentance of sale and purchase ' (*krayavikrayānuśaya*). Nārada splits the two. Lakṣmīdhara follows Nārada in this respect and has separate sections for each.

A. Ncn-delivery of goods sold (pp. 429-434)

Goods sold are of two kinds: moveable and immoveable, described as *jangama* and *sthāvara*. Both are saleable and so termed *paṇya*. Sale and purchase may be in *six* ways: by tale (*gaṇitam*), by weight (*tulitam*), by measure (*meyam*), by workmanship (*kriyayā*), by beauty (*rūpataḥ*) or by lustre (*śriyā*). In respect of each of these there may arise dissatisfaction in buyer and seller.

If a man sells immovable property and does not make a delivery to the buyer, he shall have to pay its produce value, when it is handed over to the buyer, from what it may have earned in the interval between sale and delivery. If there has been a fall in this interval, the buyer must get the article and the difference in price. In the case of movables the variation in price may be commoner.

A seller can be compelled by the king to deliver the sold article to the purchaser, with interest, if the price has already been paid, and on default he may also be fined by the king 100 paṇas. Manu and others allow a period of ten days within which the transaction may be revoked (Manu, VIII 223, p. 430). This rule will apply to cases in which the article does not deteriorate in the interval of the days of grace. The deterioration may be in quantity, quality and price. Nārada limits returnability—without deduction—to one made the same day (p. 430). If in the interval between sale and delivery the article

1 " It does credit to ancient writers on Dharmaśāstra that they were tolerant enough to require the king, whatever his own religious persuasion might be, to honour and enforce the usages of even heretics among themselves. The only requirement was that the enforcement of the usages must not be opposed to the interests of the country or capital and must not cause commotion and must not be plainly immoral. " (P. V. Kane, *History of Dharmaśāstra*, III, p. 488).

deteriorates, or is destroyed by fire or damaged, the loss shall be the seller's (p. 431). A buyer may give an earnest money when the purchase is made, the balance to be paid on delivery of the article; but if no specific date for delivery has also been settled also, and the buyer refuses to accept delivery, he is to blame (p. 433). If the buyer refuses the article, after it was sold to him, and it is sold to another, any loss that may accrue to the seller thereby must be borne by him alone (Yājñavalkya, II, 255). Fraud in sale is punishable by a fine of twice the value of the article sold, and payment of twice the sale price to the buyer (p. 432). The same penalty will fall on a dishonest seller who conceals from the buyer a blemish in the article sold. Sales or purchases by persons, who are drunk, or insane or in terror or hardly themselves through nervousness are void. The seller who sells a thing to one person, and delivers it to another, must pay double its price to the buyer and an equal amount as a fine to the king for his dishonesty. Nārada exhorts traders to fix a just price on their commodities, according to place and time, and desist from dishonest practices (p. 434).

Repentance of Purchase (*Krītvānuśayaḥ*)

Rescision of purchase occurs when a buyer repents of his action and wants to get back the price paid. He may think he has made a foolish bargain. If he returns it to the vendor on the day of purchase, in an undamaged condition, he can get back the price. If the return is made on the second or third days, he will have a loss of one-thirtieth and one-fifteenth of the price. After the third day the purchaser must keep the article (p. 435). Having bought a milch cow and the like, if a buyer repents of it, he may return it and lose a tenth part of its price. This is the rule if the article does not deteriorate by use. If it is one that does, then the penalty is one-sixth the price. Caṇḍeśvara (*Vivāda-ratnākara p.* 197) holds that the lower penalty is to be met when the rescision is sought *before* taking delivery of the thing sold. A merchant is expected to know how vendible articles are valued. He must not therefore ask for the rescision of a purchase made by him (p. 436). A buyer must always inspect the thing to be bought. In the case of brick, wood, hides, grain, cloth and wines the inspection before purchase must be made at once. Milch cows can be tested for ten days, beasts of burden for five, and precious stones for seven. They are returnable within these periods; male slaves for a fortnight, and female slaves for a month, iron and cloths in one day. Discovery of blemish within these periods makes the article returnable. Ragged and soiled clothing are not returnable even if they were in that condition when bought (p. 437).

Boundary Disputes (*Sīmāvivādaḥ*)

Lakṣmīdhara begins the section on "boundary disputes" with a citation from Bṛhaspati (p. 438) which states that the section of *simāvivāda* deals with

the laws concerning boundaries of villages, fields, houses *and so forth* (*ādinām*). The extension to subjects which have some relation to boundaries brings under this heading many questions of proprietary right, including easements and rights and liabilities of owners of properties by *atideśa, i.e.* analogy or extended application. A sub-section of this chapter is therefore headed "*tasyātideśah*" (p. 452).

Kātyāyana states that the six causes of disputes about land are based on claims for more land than one holds, contention that another is entitled to less land than he holds, claim to a share in land (on other grounds than inheritance), total denial of a share in land to another, seizing a land when it has not till then been in possession, and delimitation of a boundary (p. 438). Nārada defines it as dispute in regard to land in which questions about dikes (*setu*), boundaries of fields (*kedāra*), a boundary (*maryādā*), tilled land (*kṛṣṭa*) and fallow land or waste (*akṛṣṭa*) have to be settled. In every one of these cases boundaries have to be settled, and so disputes concerning them can be brought within boundary disputes. Disputes between villages are usually only as regards their boundaries. The determination of such boundaries is thus a State duty, and may have to be done when the villages are first constituted or when disputes crop up later.

Boundaries or boundary marks, according to Nārada (p. 448), are those marked by tall trees like flag staffs, visible from a distance (*dhvajinī*), river boundaries (*sandhinī*), boundaries indicated by concealed objects (*naidhānī*) those settled by agreement of parties, and therefore free from apprehension (*bhayavarjitā*) and those created by royal command (*rājāśāsananītā*). Determination of boundaries by the king may take place when a village is founded or formed, or after a dispute, which is finally decided by the king or by his officers.

Manu advises the planting of tall and big tress (named in his list) and clumps of bamboos on boundaries to mark them. They are termed boundary trees (*sīmāvṛkṣāh*). Raised mounds, thickets and reeds are also suggested to mark bounds. At the junction of boundaries the construction of tanks, wells, cisterns, fountains and temples is also advised (p. 439). Channels and rivers also can mark boundaries of adjoining villages.

For marking boundaries, whether of houses or villages, one of the suggested ways is to put some imperishable objects (like bones, ashes, hair, chaff, cinders, bricks, potsherds, pebbles and sand) underground. When disputes arise they can be dug up as proof (p. 440). Young villagers should be made to know of their location, so that their knowledge of them when they get old may be helpful in settlement of disputes; and such knowledge might pass from generation to

generation. When the inspection of such signs does not finalise a settlement, recourse must be had to evidence of witnesses (Manu, VIII, 253, p. 442). Continued possession or enjoyment (*bhoga*) is as good a proof as that testified to by witnesses.

River boundaries have a defect; they may change their courses. They may carry away some land from a property, and thereby diminish its area, and a property on the other side of the river may get an accretion (Bṛhaspati, pp. 450-451). Land abandoned by a river and accruing to land belonging to a man will be his, by a change in its course. A river boundary that is accepted as demarcating two villages should never be given up. The loss or gain a river causes is regarded as due to mere luck. When a piece of cultivated land is intersected by a change in the river's course, the former owner gets the produce or crops, but the land that has been added to a village will belong to it. This is the view of *Smṛticandrikā*, (p. 549). Caṇḍeśvara (p. 217) thinks that the accretion still continues to belong to the original village.

Decision of Disputes by Evidence of Witnesses

The relevant witnesses are neighbours, aged villagers, permanent residents of the village (*śāmantāḥ*) fowlers, fishermen and, men who had seen the boundary erected (*vṛddhāḥ*) and who can bear witness to the payment of taxes by the occupant (p. 448). The witnesses should be examined in the presence of a crowd of villagers and of the contestants. They should depose after putting clods of earth on their heads, and flowers, and clad in red clothes, and after being put on oath they should depose and indicate the boundaries. Even a single witness, who is trustworthy, can by his deposition in the above way, settle the dispute (p. 445). Nearest neighbours are to be preferred as witnesses to those who live at a distance. Other rites to be undergone by the witnesses show that they were to impress on them the risk of divine punishment if they depose falsely.

Extension of the Principle (atideśa)

The disputes about boundaries between villages shall be decided by the king. The kingdom should be divided into areas containing ten, hundred and a thousand villages, and the boundaries of these also should be laid down by the king, proceeding by marks. The same rule applies to disputes as to boundaries of houses, gardens, warehouses etc. (p. 452).

Easementary rights are enunciated, as evolved from boundary settlement principles. Windows, drains, 'pegs' or balconies projecting from a wall should not be interfered with, if they have long been in existence (p. 453). Neighbours should not interfere with the foundations of walls, or drains, balconies or windows of houses that adjoin their's, under penalty of a fine. But if windows or 'pegs'

have not been there before, they cannot be newly added by a house owner, so as to interfere with a neighbouring house. Windows that invade a neighbour's privacy are prohibited (p. 453). A drain which will carry water into a neighbour's house is forbidden. A fire-place, latrine and a dung-heap must not be made close to a neighbour's residence; it should be at least two cubits from its walls (p. 454).

Tanks and roads should not be defiled by ordure. He who drops filth on them, except under extreme necessity, will be fined two kārṣāpaṇas (p. 455), and he must himself remove the filth. A child, a pregnant woman and one in extreme necessity (*āpadgataḥ*) will be excused for contravening this rule (Manu, IX, 283). The defilement with ordure of holy waters, tanks or river ghats will entail the first amercement (p. 455).

A cross road (*catuṣpatha*), a temple, a stieet, or a public highway should not be obstructed by pits for keeping ordure, or by aqueducts, or drains, or projecting terraces or roofs, and the like. (Kātyāyana, p. 554). A pathway by which men and cattle pass must not be obstructed by any one. On streets, three feet of space must be left unbuilt on the sides of houses. A temple on a road must not be obstructed.

A destroyer of landmarks which indicate boundaries should be made to pay the highest amercement and remake the landmarks (p. 456). For breaking up a landmark, for encroaching beyond a boundary and for usurping lands the amercements are respectively the lowest, highest and middlemost (p. 456).

If a tree in one's garden streteches its branches beyond his land, it still belongs to him in whose land it has its roots. When trees mark the boundaries of two fields their fruit should be evenly divided between the owners of the two fields.

Dykes (Setu).

The erection of a dyke in another's field is not culpable, as the advantages flowing from it are greater than the small inconveniences caused. A dyke which will do good should not be obstructed when being built. No grain is produced without water but excess of water impedes grain growth. So, there are two classes of dykes, *viz.*, for storing water (embankment dyke) and for draining away surplus water (*kheya*).

Tilled and Untilled Land (Vikṛṣṭākṛṣṭa)

When land lies fallow because its owner is unable to cultivate it, or has gone away to another country, another man may cultivate it, but he must restore it to the owner when he returns and pays the cost of the improvements made by the cultivator (p. 459) The actual cultivator of such land shall enjoy it for

eight years only, paying the owner one-eighth the produce every year (Kātyāyana, p. 459).

A field and a house enjoyed for three generations by a man and his ancestors cannot be taken away from him by force, except when the king wills it (p. 459). But let not the king do so, as a householder's house and field are the two foundations of a man's life (Nārada, p. 460). When one neglects to cultivate arable land ('land that has been broken up by the plough'), it may be cultivated by another, who will pay part of the produce to the owner. The lessee of a field who neglects to cultivate it must still pay its owner the value of the average yield from it (Bṛhaspati, p. 460). He who neither cultivates his land himself nor allows another to do so, after taking it on lease, must pay the value of its yield to the owner and an equal amount as a fine to the king. This is to prevent land lying idle.

Protection of Crops (*Sasyarakṣā*)

Pasture land can be provided by the desire of the village or of the king, and a space of 100 *dhanus* must be left for pasture between village and village, of two hundred for a small town, and four hundered for a city (p. 461).

An open space one-hundred *dhanus* in width should be reserved for pasture in a village and thrice the space in a town. If cattle damage unfenced crops, the king shall punish their owner (p. 462). A herdsman is not responsible for damage done to an unfenced field by cattle in his charge (Nārada). If cattle stray in to a field without being made to do so by their owner, he is not responsible for the damage. Wilful trespass is punishable. A herdsman is punishable who allows his cattle to enter and damage crops in a fenced field (p. 463). Compensation claimed for crops eaten by cows is not 'meritorious': the claimant's ancestors will refuse to partake of his offerings (Uśanas, p. 463).

A good, high fence should be put by the owner on the side of a field that faces a road (p. 463). Animals taste sweet crops (p. 464).

Penalty for destroying Crops (*Sasyghātadaṇḍa*)

A cow trespassing into a field by day will lead to a fine of one and one-fourth *paṇa*, (*sapāda*), and for night trespass by a cow the fine is 5 māṣas. The owner of trespassing cattle shall pay a paṇa, half-a-paṇa and one-fourth paṇa respectively for each cow, buffalo, or sheep or goat that trespasses (p. 464). Similar amounts payable to owners are indicated by other smṛtis. An owner must be *fully* compensated by the owner whose cattle completely uproot the crops of the former. If the animals sit on the field after eating up the crops, the penalty is double the former (p. 466). The herdsman will be beaten (p. 466). The damage done by the cattle should be made good by their owner to the owner of the field, after being assessed by a third person (p. 467).

Immunity from Penalty (*adaṇḍyāḥ*)

Elephants, horses and mules are protectors of the subjects (*prajāpālāḥ*); they are immune from penalty for destroying crops (p. 469). So are cows within ten days of calving, dedicated bulls, or dedicated goats, a cow that has strayed away from its herd (*āgantukā gauḥ*), and all of them in times of festivity (*utsave*), if they take part in it, or during *śrāddhas*.

Nārada (p. 469) forbids the beating of trespassing cattle but Bṛhaspati allows it (p. 470).

LAW OF CRIMES

The term *sāhasa*, derived from *sahas*, 'force', is used in both a comprehensive and in a narrow sense. In the former, it includes, five sections of criminal law, *viz.*, abuse and defamation (*vākpāruṣya* and *daṇḍapāruṣya*), theft (*steya*), adultery and allied offences (*strīsaṃgrahaṇam*) and crimes of violence proper (*sāhasa*). Robbery, being open and violent, is sāhasa, while theft (*steya*) which means the *secret* appropriation of another's property is unviolent. Bṛhaspati and Nārada state that *sāhasa* is of *four* kinds (or *five*): manslaughter (*manuṣyamāraṇam*), theft (*cauryam*), adultery (*paradārābhimarśanam*), and the two sorts of *pāruṣya*, *viz.*, insult and defamation. It is defined as what is done by force (*sahasā*), and *sahas* (p. 556) is equated in meaning with *bala* (strength, force). But though this comprehensive character is given to the term *sāhasa*, the other four topics, besides crimes of violence, like manslaughter, are treated under different heads. It is noteworthy that Lakṣmīdhara begins his treatment of the first of the divisions of *sāhasa*, *viz.*, *vākpāruṣya*, without citing the comprehensive definition of Nārada, which he cites only in a later section on *sāhasa* proper (section 71, p. 556). Under theft a distinction is made between secret theft (*steya*) and robbery in which violence is an element, and is therefore brought under *sāhasa*. There is some overlapping naturally between the offences, as killing may be by violence or by poison, but both are treated under *sāhasa*. The distinctions are due mainly to differentiation of involved criminality, in the offences and their appropriate punishments of varying severity.

Abuse and Defamation (*Vākpāruṣya*)

Pāruṣya means harshness. *Vākpāruṣya* is defined by Nārada (p. 471) as an offensive statement couched in foul and violent language (*nyaṅga saṃhitam*), in regard to the native country, caste, family and so forth, about another person. A man may be insulted by saying that men of his native area 'are by nature fond of creating trouble,' or of his *varṇa* have bad qualities (as by saying to a Brāhmaṇa that 'Brāhmaṇas are excessively greedy', or of his groups or family (as by saying that 'the men of the *gotra* of Viśvāmitra are cruel by

nature). The harshness of the utterance must be evident, and there may be exclamatory interjections showing threats, like *hum*. The insulting address may be harsh (*niṣṭhura*), vulgarly worded (*aślīla*) or virulent or biting (*tīvra*). The harsh expression may be coupled with reproaches; the 'vulgar' may be in indecent language; and the 'virulent' may suggest acts that would make a man an outcaste (*patita*). The gradation is designed to indicate the gravity of the offence and correspondingly severe penalties (p 471). The words may be accompanied by indecent gestures, like the indication of genitals (p. 472). Under the last head are words that impute to the person insulted the gravest sins (*mahāpātaka*) or treasonable acts (*rājadveṣakarī*). In the second category of insult is put references of an indecent nature to the abused man's sister or wife, and in the third included reference to his alleged addiction to drink or committing sins that would make him an outcaste. Ironical speech that suggests its opposite is a punishable insult (p. 473), as also recital of faults that are not present in the insulted person. Referring to a man's natural deformities ironically in a tone of ridicule is an insult and, though true, punishable with a small fine (p. 475). A man may be insulted by obscene references to his mother, sister or other female relations (p. 479), and an insult of the kind deserves the highest amercement. It is an insult to refer to a person who has been convicted of an offence, by mentioning it as abuse, or taxing him with an act for which he has made religious expiation (*kṛtapāvanam*) since punishment and expiation purify a person (p. 481). Abuse of the king is the highest abuse and must be punished by the cutting off of the tongue of the abuser (p. 483), for the king and the Brāhmaṇa are the two who sustain the world (*bibhrato jagat*). To call an outcaste an outcaste, and a convicted thief a thief, as an insult, is still an offence, and severely punishable. This is because punishment by expulsion from caste and for theft has purified them (p. 484).

The punishments prescribed for insults or defamation are of varying grades of severity. They range from insertion of a red hot iron into the mouth of the libeller, to beating him and imposing on him graded fines, which might go up in very serious cases to a thousand. In the earlier smṛtis (like Gautama and Śaṅkhalikhita) the punishments are harsher than in Kauṭilya or the standard verse smṛtis.

A special feature of the law of abuse is that heavier punishments in fines are imposed when the insulted person is of a higher *varṇa* than the insulter, the fine rising with the difference between them in *varṇa*—The standard fine is that which is for insults of one of the same *varṇa*. Dr. P. V. Kane cites *Smṛti-candrikā* (II, p. 327) which states that this discrimination had gone out of use in its days. But the elaboration by Lakṣmīdhara indicates their vogue in his day.

Daṇḍapāruṣya (Assault).

Under this head are brought not only actual assault, like striking a man, but threatning to assault him or touching him. By *atideśa* (extension) certain other matters that are not strictly assaults are brought under this category. Among them are inferiors in social status taking positions that belong to others who have a higher social status. The relations between parents and children as regards parental discipline or between teacher and pupil (*guru-śiṣya*), which may lead to chastisement of pupils, are also brought within this category. Injuries suffered from kept animals or beasts of burden or carriage animals, are also included in this section. Lastly, injuries to trees and plants are also brought in.

As in the case of *vākpāruṣyà* the fines are of three grades and the different offences are classed under them. Offences committed by equals get the standard penalty. An offence committed by one of a higher *varṇa* or status gets a lighter penalty than one in the inverse order, the penalty *rising* with the difference in *varṇa* or falling with it. Offences are also classed as those which cause ordinary hurt, and those that cause grievous injuries, such as peeling of the skin, cutting into the flesh, drawing blood, fracture, loss of eyes or ears or nose, or limbs, and so forth. The gravity of the injury decides the penalty's severity.

Means of assault are described as by throwing ashes on a man, or sand or mud, or dust or stones, or striking him with sticks, the hands, or weapons. The indignity involved goes to measure the gravity of the crime for estimating the penalty to be imposed. Kicking is, thus, a more serious form of attack than hitting with hands. In cases of grievous hurt the punishment will depend on an investigation of the nature and seriousness of the hurt caused. In cases of serious injury the assailant is not only fined and punished otherwise also, but he is made to bear the cost of the medical treatment of the injured person. When several persons attack a man *every one* of them is liable to a multiple of the penalty imposable on a similar attack and injury committed by a single person.

Tying up a person with a cloth is an assault of this category.

A threat of assault is also punishable, though not as severely as physical assault. In cases of mutual assault, the person who is found to have begun the assault must be punished more severely.

In deciding the penalty the motive of the assault must always be considered (Manu, VIII, 286, p. 489).

Assault on the person of a King, even if he be a tyrant, will be punished by the offender being burnt alive, tied to a stake (p. 490).

As in modern law, self-defence should not exceed reasonable limits (Cf. *Indian Penal Code*, sec. 100-101). Even a man who has been assaulted and repels it by using a deadly weapon is liable to punishment according to the effect of his reprisal (p. 497). A famous verse affirms that a determined slayer (*ātatāyin*) who attacks a man can be killed in self-defence, even if he be a learned Brāhmaṇa, a master of the Vedas (*vedapāragaḥ*).

The right of private defence against attack is admitted by smṛtis even to the extent of killing the assailant, if otherwise the defender would have been killed, but an exception is made in the case of a Brāhmaṇa assailant, with murderous intent. The *śloka* in question about the master of the Veda, who in spite of being a Brāhmaṇa can be killed in self-defence, when construed with the prohibition of killing such a person in Kaliyuga (*kalivarjya*) is treated as merely stressing the general rule of self-defence, and as not to be taken literally. The matter has been discussed in *nibandhas*, and has been dealt with at length in my paper on " *Ātatāyivadha*, or the Right of Private Defence in Dharmaśāstra " (Dr. C. Kunhan Raja Presentation Volume, pp. 197 ff.)

Discipline and Assault

Chastiement is permissible as discipline but it must not be excessive. Manu (VIII, 299-300, p. 494) and Yama (*ib.*) lay down that when a wife, a younger brother, or a son or a slave have committed faults they may be chastised by being beaten by the head of the family using a light bamboo or a rope. The fifth is a case of a teacher chastising his pupil. If the punisher goes beyond limits, he is guilty " like a thief ". Nārada will make the king punish the teacher (*guru*) who breaks this rule. Āpastamba allows an offending pupil to be punished by starvation (as he lives with his teacher), baths in cold water and even expulsion from the teacher's residence (p. 495).

Investigation of Assaults

If no witnesses are present when a person is assaulted, as when it takes place within a house or in lonely places, the guilt cannot be determined only by the marks of injury, as such marks might be selfmade or faked. In the absence of witnesses or good circumtial evidence, recourse must be to ordeals (Bṛhaspati, p. 495).

Even in defence against attack one must not exceed reasonable limits (*cf.* Indian Penal Code, sec. 100 and 101). A similar principle is behind the dictum of Kātyāyana (p. 497) that the man who strikes an assailant with a deadly weapon (and injures or kills him) is punishable by the king.

A person insulted by a low-born man or those following low trades (killing animals etc.), who whips the insulter is immune from punishment, as the offender is ordinarily liable to whipping (p. 498).

Cruelty to Animals

He who treats animals cruelly, beats or starves them or uses them when they are physically weak or diseased or 'in heat', or starved, is liable to pay the first amercement (p. 500).

Road accidents that happen through breakage of wheels or yokes of carts or of the nose-strings of animals, do not make owner and driver responsible for them (p. 501). But if the injury is due to the driver's ineptitude the owner of the cart is liable. If the cart kills a man, the driver will be punishable 'like a thief' (Manu, p. 502).

Hurting small animals and quadrupeds entails fines.

Protection of Trees

Cutting off the branches and trunks or roots of food-yielding trees makes the offender liable to a fine, and in the case of " sacred " trees (*e. g.* in a temple) the penalty is doubled. For cutting off medicinal plants, and clumps in sacred places, the penalty is half that for cutting down trees. The man who fells a fruit tree must pay the highest amercement, and compensate the owner. This is in accord with Vasiṣṭha's adjuration : " Let him not injure trees that bear flowers or fruit, except for sacrifices and extending cultivation " (p. 504).

Theft (Steya)

Robbery is effected with violence in the presence of the owner of the things taken, and theft behind his back and/*or* without his knowledge. The former kind is *sāhasa*. Force and fraud are the respective marks of the two.

Theft is divided into three classes according to the value of the articles stolen. To the first belongs stealing earthenware, seats, couches, wood, bones, leather, grass, grain and cooked food; to the second belong ordinary clothing, cattle (excluding kine) non-precious metals, rice and barley; and to the last belong precious metals like gold, precious stones, silk, women, kine, elephants, horses and what belong to a temple divinity, or to a Brāhmaṇa or to the king. Secret appropriation of the properties of persons asleep, or of disordered mind or lying drunk is *theft* (Nārada. p. 506).

Classes of Thieves

Already in dealing with the law of evidence the distinction between " open " and " secret " thieves has been dealt with. The terms 'open' and 'secret' are somewhat misleading. The essence of the offence is the removal of property. Different types of cheating are classed as " open " (*prakāśa*) theft, while we might feel that they are really done stealthily. The difference seems to lie in the time of the operation. Burglars, robbers in forests (whose identity cannot be made out), housebreakers, cut-purses, stealers of cattle (cows, horses

etc.) and stealers of women are classed as "secret" thieves—Most of such thefts have to be done at night. Clandestine acts that are classed as "open" (*prakāśa*) thefts are committed by day in ordinary transactions. In reality they are not so *open*. Use of false weights and measures or scales that do not weigh correctly owing to the location of the pivot of the balance away from the centre, those who cheat in counting, those who adulterate goods by mingling inferior kinds with superior, or who add sand to grain, or sell articles that are not what they profess to be, though similar in shape or colour, are brought under *prakāśa taskarāḥ* ('open' thieves.) Many kinds of cheating or deception are also brought under this class by the principle of *atideśa* (resemblance). Manu (IX, 225-226) classes as *secret* thieves, *i.e.* thieves proper, gamblers, dancers, heretics, men addicted to evil acts and dealers in wine. The element in 'open' theft as in bribetakers or mediators of bribes to judges, or corrupt arbitrators (*madhyasthaḥ*), sellers of imitations as genuine articles, false witnesses, practitioners of sorcery or witchcraft, quacks and medicine sellers who adulterate medicines or sell false medicines (like many modern "patent medicines")—is dishonesty, that is analogous to that of a thief, since in both cases the loss falls on parties who are victims, and are made to lose articles or their value in money. In deciding on penalties for the two kinds of thefts, judges must have had to rely on the illustrations given of the two types in smṛtis and commentaries. The common feature of all the offences is dishonesty that is designed to deprive people of their effects or money. There are obvious thieves and virtual thieves. Roguery is described as theft. The cut-purse and the burglar are provided with implements or tools to carry on their work, and the other sort are not. A thief or burglar, may be caught, after search, and found with such tools as well as stolen property (p. 510). Cheating is in effect theft, and treated as such. Cheating in prices leads to the transfer of wealth from the buyer to the fraudulent trader and is treated as theft (p. 517). The users of false or loaded dice in gambling are like thieves and are classed as such for punishment (p. 521). The goldsmith is described by Manu (IX, 292, p. 522) as the worst of cheats *sarva-kaṇṭaka-pāpiṣṭha*).

Royal responsibility for prevention of theft

The king should make good the loss sustained by a person whose property has been stolen. He should institute searches for the lost articles, and if, after he has compensated the owner, he recovers the stolen goods, he may retain them. If a thief is caught by royal officers, but the stolen goods are not recovered, the king must still make good the loss to the owner. The recovered articles may be restored to the owner. The thief who is caught may be made to pay the value of the article stolen to its owner (p. 553). Those who find lost property must intimate the matter to the king, who will give publicity to the recovery through

the public crier. If the owner does not claim it within a year, the finder will get a fourth of its value, and the article will be retained by the king (p. 554). Manu would give the king one-sixth (or one-twelfth) of recovered lost property (p. 555).

Search for Thieves (Corānveṣaṇam).

The responsibility thus laid on the king makes it more than commonly necessary for the state to start investigations that will lead to the discovery of the thieves and recovery of lost articles. Thieves may be traced by skilled persons, through footprints, or in the case of cattle-theft by the marks of the hoofs of the animals, by skilled persons. Caṇḍāla executioners and those who are accustomed to roam at night must be used to discover the criminal (p. 545). If the footprints of the thief stop at the border of a village and cannot be traced beyond it, that village must be held responsible to make good the loss. Villages in which criminals have been formerly found must be made to clear themselves. Places where thieves or criminals usually gather, like water-booths, drink-shops or taverns, brothels, theatres, assembly rooms, old gardens, uninhabited houses and groves must be watched by the police or guarded by them, and they must also patrol. These are for the prevention of thefts (p. 545). Expert criminal hunters must be used to discover them from associates, and by contact with them (p. 546). But those who are not thieves may be found with thieves. This necessitates caution (p. 547). Old criminals may be subjected to questioning. If a person who is not the thief is made to give its value, and later on the mistake is discovered, the thief catcher must be made to reimburse the harrassed person (p. 547).

Harbouring thieves

Harbouring thieves is an offence. Villages which afford food and lodging to thieves, and places of hiding should be punished. Those who provide thieves with arms, implements, fire, food and asylum or who connive at their escape, must be punished like thieves (p. 548). One who lets a thief escape when able to catch him must be punished as a thief (p. 548). Receivers of stolen property must be punished like thieves (p. 549). A brāhmaṇa, who accepts a gift from a thief, should be dealt with like a thief (p. 550).

Responsibility to help the state in preventing thefts and in catching thieves is thus laid on all subjects, and particularly on the police and servants of the state generally. If they remain passive during raids by dacoits and do not hasten to help the attacked villagers and the destruction of their crops (*hilā-bhaṅga*) or highway robbery, they will be exiled after their properties are confiscated to the state.

Culpability according to Varṇa

A long widespread modern view has been that in ancient India persons of higher castes either escaped punishment or were let off lightly for offences for which the lower castes were punished severely. This is contrary to the Smṛtis. Criminal responsibility was rightly held to rest on knowledge and discriminating power. The higher *varṇas* were regarded as possessing this capacity in a higher measure than the lower. This will account for the rules laid down by Manu (VIII, 337-338) that the culpability of a Śūdra is eightfold, of a Vaiśya sixteen-fold, of a Kṣatriya thirtytwo-fold and of a Brāhmaṇa sixty-fourfold or a hundred-fold or even twice sixtyfour-fold. This is the gradation of the penalty to be imposed on offenders conscious of their crime, *mens rea.*

Punishment of Thieves

For housebreaking at night the punishments are impalement and lopping off the hands (Manu, IX, 276), after the stolen property is restored to the owner (Vyāsa, p. 527). Hanging is the punishment for highway robbery (p. 528), and the highwayman's property is confiscated to the State. Death is the penalty for stealing women (Manu, p. 528) and, according to Vyāsa, the kidnapper must be burnt to death over a slow fire after his limbs have been lopped off (p. 528). An additional punishment is the confiscation of the property of the criminal (p. 529). It is also the punishment for the theft of a boy, a horse, or an elephant (p. 529).

Curiously the " theft " of a royal prince is not so heinous as it entails only corporal punishment or a fine of eight thousand (*Jha*, I., p. 449), and half of it for kidnapping (stealing) any other member of the royal family. Yājñavalkya will subject all kidnappers to impalement (II, 273, p. 530). Death is the penalty for those who break into a royal storehouse or armoury or the sanctum of a temple (p. 530). Mutilation (graded) is the punishment for theft of cattle. The pickpocket and shoplifter should have their thumb and forefinger cut off (p. 531), and on repetition of the offence they must lose a hand and a foot (Yājñavalkya, II, 274). Grain theft is punished by a fine of ten times the value of the stolen grain, and also a fine to the king of twice its value (Bṛhaspati, p. 532).

Manu makes the penalty for this offence eleven times the value of the grain, and as much as a fine. Crops destroyed (maliciously) by husbandmen is theft, and entails a fine of ten times the king's share (p. 532). Death penalty or mutilation of limbs is imposed on theft of costly gold articles or bales of costly clothing, or precious stones (p. 533-534). For theft of farm implements the fine is 108, when done during cultivation (p. 534) and for stealing flowers and unhusked grain the fine is only 5 kṛṣṇalas.

The Smṛtis supply standard specifications of the loss or accruement in different cases like weaving, metal work etc. For stealing articles of small value there are small fines *e. g.* for milk and milk products the thief should repay the value to the owner and twice the value as a fine (p. 537).

Penalties for persons committing Manifest Theft (prakāśa taskara)

If a trader abstracts an eighth part of an article sold by the use of false measures or scales, he will be fined in proportion to the degree of cheating, that for stealing an eighth part being 200 paṇas (p. 512). He who sells as seed what is not seed must suffer mutilation (p. 513). Adulteration of medicines, salts, molasses and the like, with inferior stuff, entails a fine of 12 paṇas. Mutilation is the penalty for using false weights and measures (p. 515), or the highest amercement. Curiously, counterfeiting coins is to be met only by the highest amercement, as coins were only ingots of metal, whose weight was known (p. 515). Combinations of traders to enhance prices is punishable by a fine of 1000 paṇas (p. 516). The exportation by traders of articles in which the state has a monopoly is met by confiscation of entire property of the culprits (p. 515). The sale of prohibited articles is met by corporal punishment and mutilation (p. 516). A quack is punished as a thief (p. 520). He who plays with false dice is to be expelled from the gaming house (p. 520). Stakes must be open. A gambler who cheats will be banished (p. 520). Corrupt judges must be banished (p. 521). The sellers of false gold etc. must pay back the price given thereof, and double the value as a fine to the king (p. 523). The wastage in metals (gold, silver, copper, zinc, lead etc.) is stated in percentages, as also of silk, cotton or woollen cloths. A deficiency beyond the limits indicated entails fines (pp. 524-526). A washerman who wears the clothing given for wash is fined 8 paṇas (p. 526). Loss of a cloth given for wash must be made good by the washerman (p. 526).

Crimes of Violence (Sāhasa)

Of the five types of *sāhasa* enumerated by Nārada manslaughter (*manuṣya-māraṇam*), robbery and indecent assault on a woman are three (p. 557). The two kinds of *pāruṣya* and theft are the two others that have already been dealt with.

It is usual to classify offences into kinds varying with the severity of the penalties imposed. The three kinds usually reflect the lowest, middling and highest punishment. Violence of the first sort is illustrated by destruction of trees, fruit, roots and water reservoirs etc.; injuring cattle, or clothing, food, household utensils or drinks represent the middle class; taking away a man's life, by weapons or poison, and attacks on life generally and violence to another man's wife constitute the highest type of violence (p. 557). For the first type

of offences fines range from a hundred, according to the damage done; for the second type fines beginning with two-hundred and above are fixed; and for the third class represented by the robbery of costly things (*uttamadravya*) like gold, precious stones, the property of gods and Brāhmaṇas and hurting men and women still higher fines and corporal penalties are indicated (p. 557). The penalty imposed must suit the crime. For the middle type it must be between 100 and 500, and for the highest bodily penalties (amputation of limbs and branding), confiscation of entire property and banishment, are prescribed. For ordinary property robbed the penalty is a fine of twice the value of the article robbed, and four times the value, if the offence is denied by the accused (Yājñavalkya, II, 232). The second amercement is for demolition of walls or houses. For breaking idols or causing damage to temples, the penalty is the first amercement (p. 566). This is also for obstruction of channels or making breaches in ramparts (p. 537). For setting fire to a house or a forest or threshing grounds the penalty is beyond the fine limit, and may extend to death by fire (Yājñavalkya, II, 278). For making a free girl a slave, death is the punishment (p. 566). Breakers of irrigation dams must suffer mutilation or death. Though ordinarily the punishments for women are lower than those for men, a woman who has set fire to a house, or poisoned a person, or killed her children, husband or elders should be tied up and thrown into water, *unless she is pregnant.* Killing a woman who is pregnant is killing her and the unborn child. Yama would subject persons guilty of arson, grave theft and murder and abetment of murder only to corporal punishment (p. 567). Procuring abortion and causing hurt by weapons earn only the highest amercement (p. 571). Uśanas discriminates between modes of causing abortion and would sentence to the highest amercement only the one who uses the most violent (p. 571).

For murder, death (in various forms) is the penalty, according to the gruesome nature of the offence, and the murderer's property is to be confiscated also (p. 571). An offence or crime has to be expiated by penances of various kinds (*prāyaścitta*), and the *dharmasūtras* describe these. Here too the penance is more severe to one who murders a Brāhmaṇa or an *ātreyī* (a woman, after her menstrual bath, who is fit to conceive) than for the killing of persons of lower *varṇa*. Heavy fines on poor *varṇas* might be less welcome to the culprits then even death. When several men attack a person and kill him, he who gave the fatal blow is alone to be sentenced for murder (p. 572). The other assailants of the murdered man shall suffer only half the penalty of the person who struck the fatal blow (p. 573) and their culpability and its penalty should be determined by consideration of the kind of injury their attack caused short of death (p. 573). The inciter or the man who engages another to do a crime for him, must pay four times the fine impossible on the actual culprit (Yājñavalkya, p. 573).

Considerations of *varṇa* enter into the determination of turpitude and penalty. If one of a lower *varṇa* murders a Brāhmaṇa the penalty is death along with confiscation of the entire property of the criminal (Baudhāyana, p. 572). Śaṅkhalikhita (p. 566) impose the penalties of mutilation or death on one who sells as a slave a girl who is not a slave. Kātyāyana brackets as equals in turpitude he who commences a violent attack (*sāhasa*), or gives advice to another as to how the violent crime is to be done, or gives asylum to a criminal guilty of such an offence, or arms him, or feeds him, and who does not prevent the commission of the offence though in a position to do so, with the actual criminal; both must be punished alike (p. 574). Admission of a crime may lead to the imposition of only half the normal penalty for it (p. 574).

Extension of the Idea of Sāhasa

A number of offences, some of which will now seem trivial, are brought under this category. Some have their basis in a feeling of resentment against an act done contrary to accepted *varṇa* rules. Thus entertaining a *śūdra* ascetic as a guest in an oblation to gods entails a fine of 100 paṇas (Viṣṇu, 559). An untouchable (*aspṛśya*) who touches a *dvija* deliberately (*kāmakāreṇa*) is fit for death (*vadhyaḥ*, p. 560). He who abuses a venerable person is to be fined. Relations like husband and wife, brothers and sisters, father and son as well as preceptor and pupil who abandon each other without proper cause shall be fined 100 paṇas. Parents, wives or sons cannot be abandoned unless guilty of offences involving loss of caste; if one transgresses the rule the penalty is a fine and is 600 paṇas (p. 561). Omitting to invite a Brāhmaṇa neighbour to a feast or a śrāddha dinner is an offence. He who does not come to eat, after accepting an invitation to dinner, is liable to fine. A Brāhmaṇa who accepts an invitation to accept a gift, and fails to go to accept it, without proper cause, is to be fined 10 paṇas. Witnesses in a dispute between father and son are liable to fine (p. 563). Offering food that he should not eat to a Brāhmaṇa is an insult and is punishable by a fine of 100 *suvarṇas*. The man who compels another to eat or drink what he is not allowed to eat or drink will be fined (p. 564). The seller of used shrouds is to be fined. A man, who, in trying to conceal the visit of his wife's paramour, calls him a thief (*jāram coraṁ iti abhivadan*) either from shame or from getting a bribe from the culprit must pay a fine of 500 (p. 534). Performers of magic rites aimed at damaging others (*abhicāra*) are to be fined 200. A śūdra who masquerades as a Brāhmaṇa is to be fined 800 (p. 535).

Dishonest officials may be put to death by the king (p. 568) and bribe takers deprived of their property. Disrespect to the king of various kinds are punishable severely (p. 569). He who tries to usurp the throne should be killed (p. 569). Forgers of royal edicts, policemen who allow criminals to escape, sowers of dissension and persons helping the king's enemies must be put to death (p. 570).

A Brāhmaṇa is immune from both death and corporal punishment. He will have his head shaved (*i. e.* the tuft, which has religious value, removed), branded on the forehead with marks of infamy and banished from society, or imprisoned and made to do ignoble kinds of work (p. 573). The former punishment, by depriving the criminal Brāhmaṇa of means of expiation or purification (as he has become an outlaw), virtually sentences him to death by starvation outside society, with the dread of postmortuary punishment for the unexpiated crime. For one who has been brought up in faith in transmigration, death has not the terror that it may have to an atheist or materialist. The punishment thus meted out may be described as worse than capital punishment, which, if undergone, expiates the crime.

Detection of Grave Crimes

When a person is found killed and the perpetrator of the crime is not found, his sons, relations and neighbours should be interrogated regarding his morals, quarrels and so forth, to find out possible causes. The king's officers must try all possible means of discovering the culprit. The person arrested as perpetrator of the crime must be subjected to an ordeal, when there is no clear proof of his guilt. If he is cleared by the ordeal, he should be set free, but suffer the death penalty if the ordeal goes against him. Crimes of violence may be met by impalement or other terrifying punishments. The aim is less to frighten the culprit as to terrify others (p. 575). Bṛhaspati affirms rightly that it is by kindness to good men and by punishment of criminals that the fame of a king grows (p. 576).

Abduction of Women (Strīsamgrahaṇam)

Such abduction is for adultery. It is viewed as a very grave offence as it involves not only a moral fall of the parties but may lead to a mixture of blood between *varṇas* in a normal (*anuloma*) or abnormal (*pratiloma*) order. A king's fame is enhanced by prevention of such acts (p. 680).

The women with whom adultery may be committed may be of different classes, who are classed as " protected " (*gupta*) and " unprotected " (*agupta*), virgins and non-virgins, prostitutes and kept-mistresses, women who make a living by prostitution, and women of castes that subsist by the immorality of their women *e. g.* minstrels and actors (p. 590). Unnatural sex relation is possible between men and men, and women and women, as well as unnatural ways of sex-union, and is punishable.

Kinds of Adultery

Adultery, says Bṛhaspati, has its root in sin (*pāpamūlam*), and it is of three sorts, *viz.*, brought about by force, deception or sensual desire (p. 577). The first is rape, and is committed on an unwilling woman who cries for help,

or on one who lies asleep, or drunk or unconscious; the second, when a woman is led to a man's house by false pretexts and made to have intercourse with him; or after a good deal of flirtation, the details of which are described, the woman yields to her sensual desire, which has been stimulated. Meeting a woman in a solitary place and casting amorous glances at her are deemed by Vyāsa as adultery of the first sort; so also doing those things that are now referred to as "dating" constitute adultery though it is only flirtation, not ending in sex intercourse. The next step is sending a woman garlands, perfumery, ornaments and clothes as gifts, which she accepts. This may lead to greater familiarity and end in adultery; it is of the second degree. Sitting on the same bed, embracing, dallying and touching one another in forbidden places on the body constitute the highest degree of adultery as it must end in sex intercourse. A man who has come to this stage may, if discovered, be arrested for adultery, even though the intercourse has not taken place [p. 571).

Kātyāyana classifies adultery by signs of intimacy like these (p. 580). For the three grades of adultery, which does not end in intercourse, fines are prescribed, and the amount of the fines is not absolute, as it may be enhanced when the male is wealthy (p. 581). A man who has been convicted of the offence once before will be convicted again even if he is found conversing with a woman. A go-between or pimp should be punished like an adulterer (p. 581). It is not adultery if a woman of her own accord comes to a man (p. 582), and if wives of men suffering from pthisis, or impotence or who neglect them for other women come to a man of their own accord, he is not criminal (p. 582). Professional workers can speak freely with women, protected or not, without being suspected (p. 582). When one is forbidden to speak to a woman, and does so, he is guilty and must be fined one gold coin (p. 582). Manu denounces adultery as likely to lead to confusion of castes, and exhorts kings to stop it by stringent penalties. A non-Brāhmaṇa, rules Manu (VIII, 359), who commits adultery with a Brāhmaṇa woman can be sentenced to a penalty upto death (*prāṇāntam*). As pointed out on p. 584, *infra*, this interdiction of Manu applies, according to Medhātithi, to *all* cases of adultery, whether *anuloma* or *pratiloma*, *i. e.* with a woman of equal or lower varṇa or the reverse, because "for social security, wives *must* be protected from taint, even more than life and property, irrespective of caste." But, Lakṣmīdhara, followed by Caṇḍeśwara and Vācaspatimiśra, restricts the rule to *pratiloma* adultery. Medhātithi holds that only a Śūdra should suffer death for adultery with a Brāhmaṇa woman.

Penalties for Co-habitation (*Abhigamadaṇḍāḥ*)

For rape the punishment is death, and it may be coupled with confiscation of the entire property and the cutting of the organs of the culprit before he is put to death (p. 585). For incest (in both a restricted and in an extended

sense so as to include adultery with a teacher's daughter) the same punishments are laid down by Nārada, who rules that adultery with a queen is equal to incest (p. 587).

Intercourse with her consent, with a 'protected' woman (*guptā*) shall be met by a fine of 500: if it has been without her consent, but not (like rape) by force, the fine shall be 1000. A Brāhamaṇa culprit will have his head shaved. The same penalty is for similar offences by men of other varṇas. The twice-born man who commits adultery with a Sūdra female shall be "banished", according to Āpastamba. Repetition of the offence by a culprit leads to double the prescribed fine for a first offence. Intercourse with *caṇḍāla* women is banned by very severe punishments, upto death (p. 589). The pollution of Brāhamaṇa lineage by adultery by men of lower varṇas with Brāhamaṇa women is prevented by very severe penalties to both the man and the woman, who is asked to be devoured by dogs (p. 591). Vasiṣṭha in dealing with the sin caused by adultery notes that submitting to the legal punishment purifies the offender of the sin: it acts as expiation, a common doctrine of smṛtis. A woman who seduces a man, by coming to his house and tempting him, shall be disfigured and thrown into water (p. 593). A raped woman is to be kept guarded with bare clothes and food (p. 594) for her expiation; but no criminality attaches to her.

Pollution of Virgins (*Kanyāduṣaṇam*)

The defilement of a virgin is a heinous crime as it will take away her chances of marriage. In view of the low age for marriage prescribed in smṛtis, it will mean also physical injury to girls who may not have attained puberty. The death penalty, laid by Manu (p. 595) for the defloration of an unwilling virgin girl, is intelligible in view of what she is made to suffer. If the violator is of the same *varṇa* as the girl, he must be made to marry her without dowry (Medhātithi, p. 595), and he may have to pay the *śulka* (bride price) to the father, as in *āsura* marriage. Medhātithi remarks that marriage is not invariably based on affection (*necchāsamyogamātram vivāḥ*), and the violater must marry the girl though they may not like one another (p. 596). For a *pratiloma* seduction the penalty is death, according to Yājñavalkya (II, 288). If the violation has been through the girl's willingness the man shall be only fined (p. 597).

Unnatural Offences

A woman violating a girl shall be fined, and have to pay her nuptial fee; and with her head shaved (p. 597) she should be paraded on an ass's back.

Intercourse with Harlots (*Bandhakyabhigamanam*)

Intercourse with a harlot of his own caste entails only a small fine, which will be enhanced if she is of a lower *varṇa*. Intercourse with another man's kept

mistress will be treated and punished as adultery with a married woman. It will entail a fine, however, of only 50 paṇas. If several men have intercourse with an unwilling prostitute, each shall pay a heavy fine. Intercourse, against the order of nature, with a woman by a man, is punishable as is intercourse with a female animal (p. 599).

Husband and Wife-Their Mutual Relations (*Strīpumyoga*)

In the previous section Lakṣmīdhara had dealt with a vicious life brought about by sex impulse. In the present he deals with the duties of women, married or unmarried, virgin or widow, with children or childless. Caṇḍeśwara points out ((*Vivādaratnākara*, p. 409) that it is the duty of the king to see that husband and wife live righteously, following the duties indicated by true Dharma (*nijadharma*) and they should be punished if they violate the duties prescribed by śāstras, the king taking action *suo moto*, as law-suits between husband and wife are prohibited. For the guidance of the king and courts, as much as for married couples, a *full* treatment of the mutual duties of a married pair is necessary. Lakṣmīdhara has kept this in view, and dealt with the subject elaborately, after having already dealt with the rites of marriage (*vivāhavidhi*) in his *Gṛahasthakāṇḍa* (pp. 70-101). No topic is of more importance at any time than the determination of the reciprocal *duties* of men and women, and especially of those who are united in wedlock. It may be noted that adultery and sex-offences are deemed more heinous in Dharmaśāstra than in modern law, and that the attitude reflects the ideals of the day, which have now greatly changed, especially in the West. Marriage is the most important sacrament for women, and it is equally important for men, in order to enable them to discharge their duties to ancestors, gods and society. It will run smoothly only when its duties are clearly understood. Performance of enjoined religious duties, procreation of sons and consequent provision of rites to ancestors, and pleasure (*rati*) are possible only from marriage.

Duties of the married pair

The duties are eternal. They are not destroyed by the death of one of the partners, or even of both. The husband's happiness and welfare depend on the wife. Women are the Goddess of Prosperity (Śrī), conferring good on those whose prosperity they desire, petted or controlled (p. 610). Viṣṇusmṛti (inf. p. 621) puts into the mouth of the goddess Lakṣmī (Śrī) the declaration that She dwells in women who are chaste, of pleasant speech, of personal and spiritual purity, delighting in making themselves pretty by wearing jewellery, of frugal habits, who are mothers of children, and are of tidy habits, who are self-controlled, unquarrelsome, charitable and generous by nature, and never deviate from Dharma. The implication is that worldly prosperity comes to such wives. Pai-

ṭhīnaṣi (p. 627) calls wives the goddesses of the home (*gṛhadevatāḥ*). Women are the goddesses of prosperity of the home (Manu, p. 609).

Happiness of the home rests on the happiness of its women. The gods are generous only where women are honoured (p. 610); where they are not honoured no sacred rite yields rewards that are promised for their performance. Where dependent women are in sorrow, the family perishes, as if by spells. Women must be honoured, loved and treated with kindness and affection (p. 610) by all the men of the family. The wife is to the husband a gift of the gods (*devadattā*), not wed of his own free will (p. 611). Women were created to be mothers, and men to procreate sons; so, religious rites must be done by them together (Manu, IX, 96). The root of domestic bliss is the wife (Dakṣa, p. 614).

Dependence of Women

Women should not be made independent (*asvatantrāḥ kāryāḥ*) but must be kept protected by their men, day and night, so as not to get lost in sensual enjoyments (p. 601). The smṛtis take a low view of the effects of leaving women free. Nārada holds that freedom ruins women (p. 602) and Manu endorses the view stating that they are protected in girlhood by fathers, in wedded youth by husbands, and in old age by sons. The view is endorsed by other smṛtis, *e.g.*, Yājñavalkya, I 85. If father, husband and son are not alive, the agnates (*jñātayaḥ*) in the joint-family should protect such women. Hārīta holds that women get ruined by freedom, misbehave with men (other than their husbands) and beget children by intrigues. A ruined wife means a ruined family, and a ruined line ((*tantunāśaḥ*)." If the link connecting legitimate descendants is lost, the sacrifices to ancestors and gods are lost, Dharma is lost and the Self is lost" (p. 602). An unprotected woman may be led into sin, and ruin both her parental family and that into which she has married. He who guards his wife well, guards his line and his Duty (p. 603). Mixture of blood may occur if a man of higher *varṇa* marries a woman of lower *varṇa*, but confusion of *varṇa* (*samkara*) is generated by adulterous women. Paiṭhinasi admonishes husbands to guard their young wives, so that temptation may not lead them astray. Married women should be guarded by elderly women of the family. A woman who is widowed should be protected, if she has no husband or parents or sons, by agnatic and cognatic relations. If no such protectors are available, she becomes a ward of the king, who should see that she does not go astray (p. 604).

A girl not married when she is nubile, and a wife who is left alone by her husband, or a mother neglected by her son cause those who neglect them to incur dishonour and sin. Manu and smṛtis hold that women succumb easily to sex impulse and go astray. The condemnation of feminine weaknesses, as if they were common to all women, is only an emphatic way of drawing attention to the

risks that exist for some of them. Manu describes women as *nirindriyāḥ*, and it is interpreted by Medhātithi as 'devoid of organs', *i.e.* strength, and he holds that courage, patience, intelligence and energy are wanting in women, who are so described in this expression (p. 605). Varadarāja taking *indriya* to mean 'soma' (used in Vedic sacrifices) says that it only means that women are disqualified by their sex for doing Vedic rite (*Vyavahāranirṇaya*, p. 455). Lakṣmīdhara interpretes the term as meaning "deficient in strength," *i.e.* wanting in a sense of Dharma, and strong intelligence (p. 606). The condemnation of women is carried further by Dakṣa who compares them to leeches (*jalauka*) because they suck away a man's means in jewellery, clothes, strength (*bala*) and virility (*vīrya*). Like a neglected ailment that becomes chronic and serious, a wife that is left unguarded and uncontrolled wanders on wrong paths freely (p. 606). Whatever a wife craves for when she is in menses, in that form is her offsrping likely to be (p. 607). The Mahābhārata exclaims that as fagots do not satisfy a raging fire so women are not satiated by men (p. 608).

Means of Safeguarding a Woman's morals (Rakṣāvidhiḥ)

Keeping wives fully employed and engaged in domestic work and in religious duties are ways of keeping them away from vice. A wife must be the mistress of the house, conrol its expenses see its religious duties performed correctly, busy herself in collecting and safeguarding the husband's wealth and in feeding him (Manu, p. 608). Work is the best protection. A woman becomes like her husband in nature as sweet waters from rivers become saltish when they mingle with the water of the ocean: she raises herself to his level and falls also with it. Between a good wife and the goddess Śrī there is no difference (p. 609). Conjugal happiness and heavenly bliss spring from their virtuous activity. The husband is reborn in the wife. Gods are pleased to dwell where wives are well treated, and leave the houses where they are not. A family perishes if its women are sunk in sorrow. When a man leaves on a tour, he must give his wife money for running the house in his absence.

Among the several wives a man may have, the senior-most is she of his own *varṇa* and she alone can share his religious duties and rites. Kātyāyana would apparently allow one who has a son to do this duty instead of the senior most (p. 612) as he is in favour of wives being made to participate in religious duties by turns, irrespective of seniority (p. 612).

A husband should tolerate a wife's weakness for a year after which she may be set aside. But a wife who shows aversion to an evil or diseased husband cannot be cast off. A husband who abandons his wife must be compelled to give her a third of his property (Yājñavalkya, I, 76) for her maintenance. One who abandons his wife through infatuation or unjustly has no defence. A wife

who practises abortion or is unchaste or recklessly extravagant or attempts to slay her husband may be set aside. The age of supersession for a wife is thus fixed by Baudhāyana : One who has begotten only daughters after twelve years, one who is barren after ten years, and the mother of still-born children after fifteen years—but, atonce, the wife who speaks harshly (*apriyavādinīm*). The last is not meant literally and is only a warning against shrewishness in a wife (p. 617). An immoral wife, and especially one who commits 'incest', is to be abandoned, but her imprisonment or slaying is not allowed (Yama, p. 618). An unchaste wife must be maintained on starvation rations.

Rules for Good Wives

Frugality, devotion to house work and the service of the husband and elders of the family, due performance of religious duties, and of vows, with the permission of the husband, modest dress, avoidance of talks with men, avoiding conversation on objectionable topics, not standing at doorways or always looking out of windows, avoidance of drinking liquor and sleep after the husband does so, and waking before him, are some of the virtues indicated in a good wife (p. 622). The *patnī* (wife) is so called because she is devoted to her lord (*pati*). 'Wife' is synonymous with 'home' (*gṛham patnī*, p. 623). A long list of acts to be done by a good wife is given from Hārīta . Most Indian wives have lived up to these ideals (pp. 624-625). Tending the Holy Fire keeps a wife happy and prevents her widowhood (p. 626). A sick husband should be tended, not disliked. A good wife is true even to a vicious husband (p. 627). A wife should not observe fasts, when her husband is alive, as it will shorten his life (p. 628). On rebirth a virtuous wife enjoys all happiness (p. 629). She who shares her partner's joys and sorrows, and dies on his pyre, is the ideal of chastity. A disloyal or harsh wife is reborn as a jackal (p. 630). A brāhmaṇa wife who is addicted to drink will not attain heaven (p. 631).

The wife whose husband has gone abroad (*prošitabhartṛ*) is under certain inhibitions. If he has gone on a long journey without providing for her expenses, she should subsist by doing blameless manual work (Manu. IX, 75). She should avoid visits to public places, not adorn herself in fine clothes and jewellery, nor take to visiting or dancing or drinking spirits. Vyāsa recommends the faithful wife to commit *sati* if her husband dies abroad ; her self-immolation will earn him beatitude. A chaste wife, declares Bṛhaspati (p. 634), who commits *sati* is not guilty of the sin of suicide. She should receive funeral offerings like one who has died naturally. But pregnant wives and wives with youug children, who are widowed, are not to commit *sati*. Whether she dies on his pyre or survives him, the wife lives only for his good (p. 635). Lakṣmīdhara accepts the authority of *Brahmapurāṇa* (which he has cited) for holding that the Ṛgveda VII, 6, 27

sanctions *sahamaraṇa* or sati.

The widow who survives should strictly follow vows and fasts, be celibate, practise charity, live on spare food and emaciate her body. No remarriage is permitted, says Manu (V, 162).

Medhātithi holds (p. 667) that *sati* is forbidden as it is suicide (*ātmatyāga*), Yama forbids levirate (*niyoga*) for raising progeny and holds that childless women have attained heaven in lakhs. Let her therefore live a chaste and ascetic life. This view is endorsed by Kātyāyana (p. 668).

Levirate (*Niyoga*)

Lakṣmīdhara cites Manu, IX, 59 (p. 639) which states that on failure of offspring, a woman, permitted properly may have intercourse with her brother-in-law or a *sapiṇḍa* of her husband for raising offspring. But Medhātithi points out that an elder brother, who approaches the wife of a younger brother, and a younger brother who has intercourse with her, except in times of misfortune, become outcastes, though authorised to act so. Failure of issue does not necessarily mean only of sons, as pointed out by Madhātithi. A daughter may be made to take the place of a son, and treated as such with the designation of *putrikā*. If therefore a daughter exists, though sons do not, *niyoga* is unnecessary and unpermissible. The approval of *niyoga* must be taken from the husband's father, brother etc., and not the woman's father. The intercourse must take place only when the full ritual (*e.g.* anointing the body with butter etc.) is done. *Niyoga* is thus to be treated as permitted but not enjoined. Nārada will have the relation continue till the woman conceives (p. 640), as it is not due to amorousness. The son born in *niyoga* is termed *kṣetraja* (Yājñavalkya, I, 69). Devala will allow *niyoga* when the husband has become an outcaste or a traitor to the king or has disappeared, but this is contrary to Nārada's injunction to wait for eight years for the reappearance of a husband, who has vanished (p. 641). Verses of Manu (IX, 64-67) condemning *niyoga* are cited by Lakṣmīdhara. Under the mimāmsā rule on the validity of statements, the *later* rule must be held to supersede the earlier, and Manu must be deemed to reject *niyoga*. Bṛhaspati regards *niyoga* as forbidden for the present age. "Many kinds of sons were recognised by ancient sages, which cannot now be accepted as men of our age are destitute of the powers that enabled those of former ages to practice them with impunity" (p. 644)

Women who have been used before (*parapūrvāḥ*).

Nārada mentions *seven* kinds of wives as enjoyed before by others. Of these, the remarried woman (*punarbhū*) is of three kinds, and the wanton (*svairiṇī*) of four. A virgin widow remarried is the first *punarbhū*; she must go through the marriage rites when married a second time. A girl who after leaving

her husband takes to another man, and later returns to her husband is the second type. When a woman, on failure of brothers-in-law, is delivered to a sapiṇḍa by her relations, if of the same caste as her, is of the third kind. A woman who goes to live with another man, from love, is the first type of wanton (*svairiṇī*). When a widow rejects *niyoga* and unites herself with a stranger from love, she is the second type of wanton. One who gives herself away to another from hunger is the third kind. A woman who, after being married in proper way, is afterwards married to another improperly, is the last kind of wanton. Manu notes that the *parapūrvā* is despised by the world (p, 645). The children of *punarbhū* woman are despised, as is the *punarbhū* herself. Intercourse with women rescused from robbers, or rivers, or famine or confusion in the country, and taken as mates will not taint the persons who cohabit with them. A woman who does not like to be given away to a man, must not be given away against her will (p. 647).

DĀYABHĀGA

Definition of Dāya

Dāya is wealth coming to a person by reason of his relationship. It is placed first among the seven sources of 'property' mentioned by Manu (X, 115). This is the definition of the *Mitākṣarā* (II, 114). The *Nighaṇṭu*, cited by *Smṛticandrikā* (II, p. 255), defines *dāya* as 'parental wealth which has to be divided' (*vibhaktavyam pitṛdravyam dāyam*). *Smṛtisaṅgraha*, which is also cited by *Smṛticandrikā*, makes the position clearer by defining *dāya* as wealth which comes through the father or the mother (*pitṛdvārāgatam dravyam mātṛdvārgatam ca yat*). *Vyavāharamayūkha* (ed. Kane, p. 93) defines *dāya* as the wealth which is to be divided, and which is not the wealth of re-united members. (Jīmūtavāhana explains the words "father's" and "by the sons" as illustrative, and as relating to the wealth of a father, grandfather etc. distributed among his relations, like sons, grandsons etc., by reason of their relationship. Nārada defines *dāyabhāga* as the division or partition of property of father and others (*pitṛyādeḥ*, inf. p. 648).

Time of partition

Manu is cited at the beginning of this subsection by Lakṣmīdhara (p. 648) to show that the division of property is to take place after the death of both parents, as while they are alive the brothers (*i, e.* sons) have no power to divide the property. *Paitṛka* in the dictum of Manu is explained by Kulluka as meaning both paternal and maternal property. If the father is an outcaste (*patita*), he will be regarded as dead for the purpose of the division of the property. Devala (p. 647) repeats the dictum of Manu that the sons are devoid of any right to partition so long as the parents are alive, and not 'civilly dead' as an

outcaste or an ascetic will be. *Vivādaratnākara* explains that " parental " (*paitṛkam*) includes the property of grandfather etc., and that as daughters have the first claim on the mother's property, the right of sons to partition must be regarded as to come only after them or if there are no daughters.

Manu's declaration that the sons are not lords (*anīśāḥ*) of the property when the father is alive (*jīvatoḥ*) and the dictum of Devala that they are not owners, so long as an untainted (*nirdoṣa*) father is alive, are taken by the school of Jīmūtavāhana as denying the contention (which is upheld by the *Mitākṣarā*) that sons, as soon as they are born, acquire a right in the family property. Sons are not masters of *artha* (wealth) and *dharma* (the duties imposed by Dharma, like the offerings to deceased ancestors) (Śaṅkhalikhita, p. 649). The father's property may, according to Gautama, be divided by the sons and father, if *he* so desires it, during his lifetime, but it must be after the mother is past child-bearing (*nivṛtte rajasi mātuḥ*), as the partition may have to be reopened if the mother gives birth to a son or sons after it has been made. *Dāyanirṇaya* (XVII, 2-6) brings under the term " mother " stepmothers also, and holds that when they are both past child-bearing and the father is willing to allow partition it may be made. Nārada (p. 653) adds two other conditions for partition during the father's life, *viz.*, his having lost sex-desire and sex-power and the sisters having been married. Śaṅkhalikhita (p. 653) states that partition during the father's lifetime may be made with his permission (*anumataḥ*), openly with the help of mediators or secretly, without it.

Hārīta (p. 643) states that if the father becomes a forest-dweller (*vānaprastha*), he may, before doing so, divide his property between his sons, or he may become a sānyāsin after doing so; or he may continue his residence in the family house, retaining a small portion of the property he had himself acquired, and when his means are exhausted he can recover the property from the sons. The disposal of self-acquired property by the father is within his rights (Viṣṇu, p. 654). A rule which Nārada cites is that the father in dividing thc property between the sons, may retain a double share for himself. The self-acquired gains of the sons during the father's lifetime, (barring 'gains of learning') should also be equally divided between the sons at partition (Manu, IX, 215). But Nārada's dictum that the father is lord of all the wealth (*sarvasyeva pitā prabhuḥ* p. 655) is cited by Lakṣmīdhara immediately after the citation from Manu, and must be held to qualify it by its position in citation. Bṛhaspati also holds the same view as Nārada and adds that the sons who go against the father's scheme of unequal distribution should be brought to order (*vineyāḥ*). A rule of Śaṅkha, cited by the *Mitākṣarā*, but omitted by Lakṣmīdhara, is that the property may be divided even against the wishes of a father, who has become senile, of disordered mind or overcome by disease (*vṛddhe, viparītacetasi, rogiṇi*). The

earlier writers are against partition in the father's lifetime ; when he gets old and senile, or diseased or of disordered mind, the undivided property should, in the father's lifetime, be looked after by the eldest son." The family has its roots in property ; sons with fathers living are unfree (to divide the estate)" (p. 651, Śaṅkhalikhita).

The father who recovers a debt or property which could not be recovered before, by his own efforts, need not, unless he wishes it, throw it into the common share for division among sons (Viṣṇu, p. 652). So is the father's right to exclude from partition the gains of learning or valour that he may have made (Bṛhaspati, p. 652) ; and he is free to give them away (p. 653). Yājñavalkya (II, 114-115) rules that the father need not give equal shares to all sons, if he makes the division, and may give an extra share to the eldest son ; if he makes all shares equal, the wives shall get equal shares too, especially those who have had no *strīdhana* from parents or husband (p. 654).

Spiritual reason for partition

The śrāddhas to ancestors will be done by the father, when he is alive, and by the eldest son if all sons live together, and by each separately if they have separated after the division of the *riktam.* "Partition leads to increase of Dharma" says Gautama. The *material* gain of living united is noted by Śaṅkhalikhita (p. 651) who also notes that the sons may, if they like, dwell together, leaning on one another and desiring their common good. When sons dwell together, the worship of gods, Vaiśvadeva, reception of guests etc. are done by the head of the family. Personal religious duties, like the tending of the sacred fire (*agnihotra*), must be done by married sons, even in a joint family. It is pointed out by *Vīramitrodaya* (p. 557) that the worshipping of gods etc. should be done by the sons together ; and even when joint, the sons can each do *agnihotra* and the *śrauta* and *smārta* rites with the aid of the common property. Entry into *gṛhasthāśrama* imposed duties that *must* be done by every one.

Minority

Kātyāyana (ed. Kane, 844-45) shows that though partition is allowed to majors usually, the minority of any sons is not a bar to partition. The property that should go to the minors, like that which should go to one who has gone abroad, should be kept (for them) by the divided brothers or relatives of the minors. The period of minority is that indicated for education. During it, the minors have to live with their elder brothers. This is interpreted by Aparārka as inhibiting partition till all brothers are majors (p. 722). Among authorities there is a difference of view as to whether minority ends with the beginning or the end of the sixteenth year. Pregnancy of the wife of a coparcener is no bar to partition, but as the sex of the unborn child is not determinable before birth,

Vasiṣṭha (XVII, 41) recommends the putting off of partition till pregnant wives of any co-parceners are delivered. Manu (IX, 216) rules that if a son is born to a coparcener after a partition of the family is effected, he inherits the shares of the father, which had been determined at partition.

Preferential share (Uddhāra)

Manu (IX, 112-114) lays down that the eldest son should get one-twentieth of the property as an extra share, one-half of it should go to the middlemost son, and one-fourth of it to the youngest. Lakṣmīdhara holds that the "eldest" son, who gets the additional share should be—not the eldest by age but the seniormost by good qualities (*guṇavat jyeṣṭhaḥ*, p. 656). The older smṛtis recommend the *uddhāra*, and even say that the eldest son gets the whole property (Gautama, XXVIII, 3). It is to be noted that Medhātithi says that some people hold the view that *preferential shares* are not meant to be observed in the present age, and that they are on the same footing as the rule sanctioning the killing of the cow for offering the *Madhuparka*. He adds that "this view is not correct. No restriction of *uddhāra* is found anywhere." It is not among barred practices cited by Dr. Kane, in his "History of Dharmaśāstra" as *kalivarjyāḥ*.

Detailed descriptions of the extra shares or articles that the eldest son, the middlemost son and the youngest son should get at partition are given by almost all smṛtis, and are collected by Lakṣmīdhara. He must be held to share the view of Medhātithi in their applicability even in his day. The eldest son is to be given the best article in the property, as well as ten of the best cattle, as his extra share. If all brothers (including the eldest) are equally skilled in their occupations, there will be no extra share in the form of the best of the cattle 'among ten,' and only some trifle shall be given to the eldest son as a token of respect.

Seniority is not entirely by age; Lakṣmīdhara remarks that the awarding of *uddhāra* (extra share) should be on the basis of the eldest son being the 'best in good qualities as well as in seniority' (*guṇavat jyeṣṭhādiviṣayaścāyamu-ddhārah*, p. 656). Gautama will give the eldest son a carriage yoked with animals that have two rows of teeth (*i.e.* horses) and a bull (p. 606); the middle-most son gets one-eyed, hornless and tailless animals, if there are several of them; and the youngest son gets the sheep, grain, iron utensils, one of each kind of animal, a cart yoked to oxen, and the family house. Curiously, the last practice has been followed by Syrian Christians in Travancore, who claim to have come with the apostle Thomas in the first century A.D. Āpastamba states that in some places (deśa) gold, black cows, and black products of the soil are the share of the eldest son, as well as the father's chariot and household furniture (p. 657). The assignment of certain things to middlemost and young-

est sons, and the indication of equal division of the remainder, indicate that animals, movables and the family house are excluded from the equal division of the property among sons. The assignment of an extra share to the eldest son is natural as he has to act as the head of the family when the father gets old and weak, and also officiate in family religious rites as its chief member.

Partition among sons of different mothers:

A householder may have more than one wife, of the same or of different *varṇas*, and have children by each or some of them. Seniority among wives will be according to the respective dates of their marriage, if they are of equal *varṇa* and of the same *varṇa* as the husband. The wives may give birth to sons at different times, and a junior wife (*kaniṣṭhā*) may beget a son or sons before the seniormost (*Jyeṣṭhā*). Which son is to be regarded as the eldest? The son born of the senior wife (*pūrvā*) is termed *pūrvaja*. Manu (IX, 123-124) rules that the son of the senior wife shall take as his preferential share (*uddhāra*) one bull, and the other bulls, which are not so good shall go to the other sons, as they will be deemed junior to him on account of their mothers being junior wives. 'Seniority among sons is determined by seniority among their mothers, and not by their own age' says Medhātithi in explaining these verses. An alternative preferential share is stated in the next verse of Manu thus: in addition to the bull (mentioned in the previous verse as his share) the son born of the senior wife (termed therefore 'Elder' or *jyeṣṭha*) will get fifteen cows, and the others according to the position of their mothers. But, in the following verse, (IX, 125) Manu has also stated that among sons born of mothers of the same *varṇa* ('equal'), seniority is not according to mothers but it is only by birth. Priority of birth is the determining factor (Rāghavānanda). Medhātithi has held that the two preceding verses (IX, 123-124) are declamatory (*arthavāda*), and that the later dictum giving seniority to one born earlier (irrespective of the position of the mothers) is Manu's *real* view. Kullūka has also noted the contradiction, and held that the apparent contradiction leaves room for option, *i. e.*, observing either rule, but selecting by the presence of superior qualifications the son to be held seniormost, in addition to his seniority in age. In the case of sons born of mothers of different *varṇas*, the son born of the wife who is of the same *varṇa* as the husband is the seniormost (*Vivādacintāmaṇi*, p. 200). Caṇḍeśvara (p. 658 *inf.*) points out that Lakṣmīdhara held that the son born of the senior wife is senior, and is entitled to the preferential share. This view is also upheld by the *Dāyanirṇaya*, 19-2-6. The determination of seniority among sons by birth is also applied to the case of twins (*yamala*) by Manu (p. 660). But even in regard to twins there has been difference of opinion, the later-born being regarded as the first to be conceived, as the result of the first seminal emission and therefore the elder (Rāghavānanda and Rāmacandra).

The opinion expressed thus is upheld by medical treatises in Sanskrit, like *Piṇḍasiddhi* and *Carakasaṃhitā*, as well as by the Bhāgavatapurāṇa. It is also the modern view, medically. But the *Vyavahāramayūkha* (p. 98), which cites these medical views, maintains nevertheless that Manu's ruling should be followed. Devala (p. 660) takes the common view that the child which comes out first is the elder.

Seniority may be lost by an eldest son by his ill-treatment of his younger brothers (p. 660). If a special share is given to the eldest (*uddhāra*), he gets two shares, according to Manu, his younger brother one share and a half, and the others one share each (p. 661). *Kṣetraja* (son born by *niyoga*) is entitled to a share like ordinary sons (p. 661). Bṛhaspati introduces a new principle in unequal division. One ' superior in birth, ' *i. e.*, the older, *as well as in learning* must get two shares, and the others only one each. This indicates that seniority among brothers is not by mothers or by age alone. The rules for special shares are ignored by Yājñavalkya (II, 117), and he rules that sons should divide the property equally, after paying off the father's debts. Among coparceners shares are determined by fathers. Sons get their father's share in the property of the grandfather (p. 662). Partition of property and *piṇḍa* (*śrāddha*) offerings to the ancestors go together (Devala, p. 663).

Widows who have had no *strīdhana* should get some share. Bṛhaspati allots the widow a share equal to that of a son, and the daughter who is unmarried a fourth of such a share (664). According to Vyāsa a sonless daughter-in-law must get a share. Bṛhaspati declares that ancestors feel that they have descendants only when one or more of them earn a name for learning, valour, and practical knowledge of affairs, and a son with such qualities *deserves* to get a larger share than other sons (p. 664). The brother who manages the paternal estate should get in addition to his share some extra like fodder, conveyance, or food. A brother, well able to maintain himself otherwise, who does not wish to get his share of the father's property, may be regarded as separated after giving him a nominal share (Manu, IX, 207). The gift of this " trifle " is to establish the fact of partition and prevent future disputes. A rule of ethics, not mere law, enunciated by Āpastamba is that all virtuous sons get equal shares, and the one who squanders money in bad ways like gambling should be debarred from getting his share, and be given only a trifle as evidence of partition (p. 665).

Persons disqualified to inherit (Vibhāgānarhāḥ)

Certain persons by reason of physical or mental or moral defects are declared unfit to get a share in inheritance. Gautama rules that even a son born of the same *varṇa* as the father should not get the father's property, " according to some, " if he is addicted to unrighteous ways. The word " even " in the sūtra

is explained as implying that when a person of the same *varṇa* as his parent is excluded because of his bad ways, much worse is the son, similarly acting, who is born of a mother of a different *varṇa* (p. 665). Manu has laid down the general rule that all who follow forbidden practices are debarred from inheriting the father's wealth. The outcaste (by reason of the actions which have made him one) is prohibited from inheriting, as he is also prohibited from offering funeral cakes and water to his father or ancestors (Śaṅkhalikhita, p. 666). What use, asks Bṛhaspati, is he, who is neither learned nor righteous nor austere nor charitable ? One who treats his father as an enemy, or who hates him (*pitṛdviṭ*) is excommunicated, for such crimes as regicide, by his relations by the ' breaking of pots ' (*ghaṭāpavarjana*). (Nārada, p. 668). According to Kātyāyana, one who having become an ascetic has renounced asceticism (*pravrajyāvasitaḥ*) or is born of a mother of the same *gotra* as the father (*sagotrādyaśca jāyate*, p. 669), is also excluded from inheritance.

Physical defects that make one less than human also disqualify for inheritance. Sons born blind, deaf, or dumb or insane or idiots or devoid of sensitiveness to touch or thought are also barred. But if one becomes impotent during married life, his children are entitled to inherit (Manu, IX, 203). Yājñavalkya (II, 140) bars from inheritance the person born lame (*paṅgu*) or with incurable disease like leprosy (p. 667). Devala bars the *liṅgī*, who makes a living by cheating at miracle-working (*atiśayena kapaṭavṛttacārī*) from inheritance. The son of an outcaste, as he is also one, is barred.

The disqualified persons have however to be maintained by those who inherit the property. So are the *aurasa* and *kṣetraja* sons of these, with the exception of the son of the *patita*, if born after the father was sent out of caste. Impotence is defined as inability to impregnate. The right to maintenance of the wives of persons thus disqualified depends on their remaining virtuous. Adulteresses should be ' sent out ' (*nirvāsyāḥ*). Children from *pratiloma* unions are disqualified from inheriting but they too must be supported by those who get the property. *Anuloma* sons alone can inherit.

Performance of Sacramental Rites (Asaṃskṛta-saṃskaraṇam)

Sacraments are compulsory. They are described in detail in Gṛhasthakāṇḍa and Brahmacārikāṇḍa. Boys and girls have sacraments, but marriage is the chief for girls. The sacramental rites that have not been done for sons, at the time of the father's death, must be performed by the brothers, out of the parental estate. If there is no parental property, the sons should still perform the sacrament from their own resources. *Upanayana* is the chief sacrament of a boy. Marriage is obligatory to girls but not to boys, as after finishing their education they may decide to remain celibate for life (Smṛticandrikā, p. 628). The sacraments should be performed for sisters, after giving them the one-fourth

share in the father's property, as well as the ornaments and *strīdhana* of their mother. The money needed for a daughter's marriage must be found by her brothers, either out of the undivided parental property, and if she was born after the partition the wealth needed for her marriage shall be given by the brothers (*Vibhāgasāra*, Jha, II, p. 394). The marriage should be celebrated in accordance with the manner suited to the property left (*vittānusāreṇa*). The daughter does not merit a share of the estate, like brothers, says Baudhāyana (p. 672).

What is divisible (Vibhājyam)

At the time of partition the property of the grandfather, the father and what has been earned or obtained by the sons, with the help of ancestral property, are divisible among the claimants. Before partition the amount needed to repay the father's debts and promised charity *(dāna)* must be taken out of the estate, and the remainder alone is divisible. The father should not remain a debtor after death. Whatever debt has been contracted for the sake of the family by brothers, paternal uncles or the mother should be first cleared before partition takes place (Kātyāyana, 846). The debts incurred by one of the coparceners for religious purposes *(dharmārtham)*, or for making a gift out of affection to some one *(prītidattam)* or debts contracted by himself shall be excluded from partition, and remain to be repaid by him who contracted them. *All* ascertainable assets of the father must be divided, and if any are suspected as concealed it must be discovered by ordeal. The odd goat or sheep or animal with uncleft hoofs (horses, mules, asses etc.) need not be divided; but must go to the eldest brother (p. 674).

What cannot be divided (Avibhājyam)

The gains of learning, or of valour, friendly gifts made to him, marriage presents *(audvāhikam)* and presents made to him when he is treated as an honoured guest to whom *madhuparka* is offered are the exclusive property of the recipient and cannot be divided with co-parceners. Ancestral property recovered *solely* by his efforts must belong to him who regained it. (p. 674). Gains of learning can be shared only when paternal property has helped in gaining it (by qualification). Whatever is given to the bridegroom at marriage is held to be the property of the bride, and is not to be partitioned. The wife's own property, received from mother or sons, cannot go into the common stock for division. The prize won in an assembly of pandits, as the result of a wager, the gifts received from a pupil as *guru*, or fees gained in a sacrifice or a prize obtained in a public disputation, or by *dāna*, are impartable. A craftsman who gets over and above the price of an article which he has made an additional amount as a prize, is also said to get *vidyādhanam* and it is entirely his, and not

to be shared (p. 677). What is gained in battle is termed *dhvajāhṛtaṃ* and is also not to be shared (p. 678). Śaṅkhalikhita declare that Prajāpati holds that a house *(vāstu)*, water vessel (*udakapātra*), used clothing, a kept mistress and water drains are not to be shared by division (p. 678). Viṣṇu holds that ornaments, a riding animal, cooked food, water in a well or pool, slaves or mistress kept by a father, property destined for pious uses or sacrifices, a common pasture ground, and in the case of kings, ministers and purohits are not partible. These last are termed *yogakṣema*. Halāyudha interprets *yoga* as boats, and *kṣema* as fortresses (p. 679). Bṛhaspati on the other hand argues that cloths and ornaments can be sold and the sale proceeds divided between coparceners; that a slave girl can be made to serve coparceners by turn; and that a common pasture may be used by coparceners according to their shares. Lakṣmīdhara reconciles the dicta of Bṛhaspati with the interdiction by Manu and others regarding the indivisibility of clothing and ornaments by noting the difficulty of dividing them without making them lose their natural form (*svarūpa*). Gains acquired by valour of those who obtained learning and training from help given by grandfather, father or relations, are partible. Vyāsa holds that what is earned from conducting sacrifices, from land, cooked food, water and women is not partible among *sagotras* 'even upto a thousandth degree' (p. 679). The *Mitākṣarā* says that the restriction on partitioning land applies only to its being done by a Brāhmaṇa's children by a non-Brāhmaṇa wife. Kātyāyana and Kauṭilya (p. 45) lay down a general rule that the disposal of inheritance should be according to whatever usages are in force in the country (*deśa*), caste (*jāti*), or association or village to which the parties belong. It means that usage or rules in corporations accepted by members overrule the ordinary law. Vasiṣṭha states that if one brother gains something by his unaided efforts, he should receive a double share of ancestral property into which his gains have been incorporated (p. 682). If without the help of the parental estate the eldest son acquires some wealth the younger brothers have a claim to a share of it, if they are also devoted to learning (Manu, IX, 204). Property which is not parental but has been built up by the labour of brothers, none of whom is specially learned, should be divided equally between them (Manu, IX, 205). If any member of a family acquires by bravery or other qualifications any such property as conveyances or weapons these should be divided among the brothers, the acquirer of them getting a double share (Vyāsa, p. 683).

Kingdoms cannot be partitioned. Manu (IX, 323) rules that a king after making gifts to Brāhmaṇas, and installing his son as king, should retire to the forest. Vyāsa (cited in *Vibhāgasāra*, 9, 1.2) states that it is the eternal law that among kings so long as the elder brother is alive the younger cannot be king. Indivisibility and primogeniture are to be observed in kingdoms.

Strīdhana (Wife's Separate Property)

The exposition of the things that are not to be divided by the coparceners on the death of their father, naturally leads to a special case of non-divisibility, *viz.*, the woman's separate estate, or *strīdhana*. The famous statement of Manu (VIII, 416) that the wife (*bhāryā*), son (*putra*) and slave (*dāsa*) are property-less (*adhanāḥ*) merely indicates, as Medhātithi has explained, that they are dependent, and that the wife should not expend her property for any purpose without her husband's permission and the son without his father's sanction. Lakṣmīdhara treats of the disposal or use of *strīdhana* (*kṛtya*) before describing in detail the nature and kinds of *strīdhana*. For reasons of clarity we may proceed to his treatment of the nature of *strīdhana* and its divisions (pp. 693-695) first.

Strīdhanalakṣaṇam :

Manu's description of the kinds of *strīdhana* is given first. It is said to consist of *six* kinds, *viz.*, what is given a wife before the sacrificial fire (*adhyagni*), what is given at the time of departure of the bride to her husband's house (*adhyāvahānika*), what is given her by the husband out of love or in dalliance (*dattam prītataḥ*) and what has been given by mother, father and brothers. Commentators have made it clear that the list is not exhaustive. It is more, but it cannot be less, as it will mean omitting six essential sorts. The gift out of affection (*prītitaḥ*) is made to the bride, when she makes her bow to her parents-in-law. It is termed *lāvaṇyārjita*, 'earned by beauty,' or *ādhivedanika*. The *Vivādacintāmaṇi* (pp. 215-216) makes this a seventh kind and not treated as a synonym for *prītidatta*. Viṣṇu (p. 693) adds to the number of gifts made by sons, what a husband gives when a wife is superseded (*ādhivedanika*), what relations (*bandhu*) present her during her wedding (*anvādheyaka*) and *śulka* (defined by Kātyāyana on p. 695 as 'the price received for household utensils, conveyances, milch-cattle, ornaments and servants, from the husband') and by the *Mitākṣarā* as the fee paid when the girl is given away. All that a girl obtains at marriage or after it at the house of the father or husband is termed *saudāyika* (Vyāsa). Thus, there are *ten* kinds of *strīdhana*. Devala (p. 693) states that four kinds of wealth constitute *strīdhana*, *viz.*, property given for maintenance (*vṛtti*), ornaments (*ābharaṇam*), *śulka* (usually rendered as 'fee') and gifts (*lābha*). *Vṛtti* is rendered (also *vṛddhi*) as gifts by father and others for maintenance and *lābha* as what is obtained for propitiating the goddess Gaurī.

Use of Strīdhana (Strīdhanakṛtyam)

Wives should not draw wealth from the family and hoard it, or do so out of their own property without the sanction of the husband (Manu, p. 683). The *dāyādah* (heirs) should not divide the ornaments worn by a woman during the

life-time of their husbands, as by doing so they will 'fall' (p. 683). What has been given to her by her husband she can enjoy after his death, as she likes, except immovable property (*sthāvarādṛte*) given during marriage. According to Jīmūtavāhana other immovable property she can give away as she likes (Jha, II, p. 547). The maximum limit to the gift to the wife is 'two-thousand,' which the *Mayūkha* interpretes as an *annual* amount (p. 854). *Saudāya* means every kind of gift received at marriage and is "dowry". Lakṣmīdhara defines it as what has been obtained by a woman from the paternal and maternal families (p. 685). Even in immovable property so obtained a wife (or widow) has absolute right of disposal (p. 685), by gift or otherwise, and this power is exercis-able in what has been given by the husband, with the exception of immovable property (*sthāvarātiriktesu*). The king should protect barren women, women who have lost their children, women who have lost all their relations on the paternal and maternal sides, and chaste women in distress, from relations who try to appropriate their possessions; and those who do so must be punished (Manu, p. 685). A husband may use his wife's *strīdhana* when he is in distress but he must later on repay it (Devala, p. 686). No member of the family, hus-band or other, has right to spend a woman's *strīdhana*, and if he does so he must be made to repay it with interest, and be also punished. If, however, it has been spent with her consent, the repayment will be without interest (p. 686). If a wife lends her *strīdhana* to a husband who is ill, or in distress or worried by creditors, he must later on repay it to her; so also during famines or when wealth is needed for religious duties (Yājñavalkya, II, 147, p. 687). A wife who is superseded by a second wife, with whom the husband begins to reside, cannot be forced by him to give him her *strīdhana*. If she is denied food, clothing and residential accommodation, she may exact her own *strīdhana* from him as well as the husband's potential share from coparceners. But she must reside in her hus-band's house, unless afflicted by disease, when she may go away to her kinsmen. *Strīdhana* promised a wife by the husband must be made good by his heirs (p. 687).

Division of Strīdhana (*Strīdhanavibhāgaḥ*)

The mother's property other than *strīdhana* is described as *mātṛkam*. Such property should be divided equally between brothers and sisters on the death of the mother. Even the daughters of daughters (*i. e.* grand-daughters) may get a small share (*kiñcit*) as a mark of affection. *Anvādheya* of the dead wife shall go to her children as well as gifts made to her by her husband from love (*prītyā*) —if she predeceases the husband. *Strīdhana* is inherited by unmarried daughters and sons; a married daughter receives only a trifle as a mark of honour (Bṛhaspati, p. 688). Gautama assigns *strīdhana* of a dead mother first to un-married daughters, and next to daughters married to poor husbands, *i.e.* unlucky

daughters. The toilet articles (*pāriṇāhyam*) of mothers go to daughters. (Vasiṣṭha, p. 689). The mother's debts must be paid before the division of *strīdhana*. In the absence of daughters, their children will inherit *strīdhana* of their grandmother (Yājñavalkya, II, 117). It should go to a 'daughter ready for marriage' (*vivāhārhā*, p. 689). If a dead wife had co-wives and dies childless, her property will go, if she was a Brāhmaṇa wife, to a daughter of a *Brāhmaṇa* co-wife. When there are no daughters, the dead wife's property goes to her sons, and her *saudāyika*, to the husband. The sisters and their husbands shall divide the property, when there are no daughters or daughters' children. In the absence of sisters the agnates (*bāndhavāḥ*) will inherit the property. Sisters, who are widows, are excluded by the restriction to 'sisters with husbands' (*sabhartṛkāḥ*).

Succession to a Childless Woman's Property:

A woman who dies childless may have been married in one of the different ways mentioned in smṛtis. Manu (p. 690) states that in the *brāhma*, *daiva*, *gāndharva*, *ārṣa* and *prājāpatya* marriages, the husband gets her property. But if their marriage had been in the *āsura* form, in which money is paid to the parents of the bride by the bridegroom, the property of the dead woman will go to her parents (p. 690). Jīmūtavāhana holds that only the wealth that came to her at marriage should go to the husband (*Dāyabhāga*, p. 88). Mitramiśra in his commentary on Yājñavalkya (p. 622) holds that an 'option' is given, by the rule, and that both husband and father should divide the property equally. Aparārka thinks that in Gāndharva and lower forms of marriage it may go either to the husband or to the parents. Devala affirms that a dead woman's *strīdhana* belongs in common to sons and unmarried daughters. If she dies childless, it goes to her husband, mother, brother and father in order (Devala, p. 691); in inferior forms of marriage the property of a dead woman, married in the *āsura* and other lower forms of marriage, her wealth goes to her brothers, after her mother, or according to some, even when the mother is alive (Gautama, p. 691). The relations (*bāndhavāḥ*) get the dead woman's property so far as it comes from gifts from relations, or *śulka* or *anvādheya* (property presented to bride by relations), if she dies without offspring (Yājñavalkya, II, 144). If a *putrikā* (appointed daughter) dies sonless, her property goes to her husband (p. 691). Caṇḍeśvara (p. 620) states that the rule will apply only where the dead *putrikā* has no unmarried daughter or sister, as pointed out by Paiṭhīnasi (p. 691). If a person, who having *verbally* given away a daughter, later on takes her away, without any defect in the bridegroom, he should be punished by the king, says Yājñavalkya, and must be made to pay all the expenses incurred by the bridegroom, with interest. But if the girl dies, the father and the bridegroom should work out their relative expenses, (*i. e.* what has been given to the bridegroom's

parents by the father of the girl as honorific present, and what has been given to the father by the bridegroom's people), and the balance that may be due to one or the other party should be paid to him (p. 692). The rule, according to all commentators, applies only when the father of the girl takes her back without a good reason, such as the availability of a better bridegroom, which is allowed by smṛtis.

Bṛhaspati equates the sister of the mother, the wives of the paternal and maternal uncles, the father's sister, the elder brother's wife and the mother-in-law. If these have no legitimate son 'of the body' (*aurasa*) nor step-son, nor a daughter's son, nor a son of these, then their sister's son and the rest shall inherit their property (p. 693).

Mistakes in Partition (*Avalupta-vibhāga*)

If some omission of assets is discovered after partition, the discovered assets should be distributed equally among the coparceners (Manu, p. 695). But there will be no special share for the eldest in this. Articles concealed by a coparcener and discovered later shall be redistributed between brothers or their sons. An erroneous partition should be remade. What a man acquires after partition is wholly his. Lost property that is recovered after partition should be partitioned (p. 695). If property has been taken away by a kinsman, he should not be *forced* to restore it; among undivided kinsmen, possession should not be set aside (Kātyāyana, p. 696). The meaning of this is that conciliatory means should be used to make the person give back for redivision the property he has appropriated. Caṇḍeśvara interprets it as meaning that instead of force, tricks should be used to get back the property for redivision (p. 526). Among undivided relatives, no one should be required to make good what he has enjoyed. Bṛhaspati advises also conciliatory methods to get back for redivision property that has been deceitfully taken possession of by a coparcener (p. 696). Even by expenditure of one's money and by cunning persuasion should cheats, cruel men and avaricious men, who have taken property that should have been divided, be made to give back for redivision such property (p. 696).

Division of Property between sons born of mothers of different varṇas (*Nānāvarṇasamavāya-vibhāgaḥ*)

If a man marries only wives of his own *varṇa* the division will be *per capita*, among sons. But marriages that are allowed are of *anuloma* type *i.e.*, the wife is of equal or lower *varṇa* than the husband. *Pratiloma* unions are forbidden, but they may result in offspring. For children of such unions, the simple rule laid down is that he will get the same share as a Brāhmaṇa's son by a Śūdra wife, *i.e.* the lowest. Gautama has laid down that a Brāhmaṇa who dies with no son by his Brāhmaṇa wife, but has left a son by a Śūdra wife, will leave to the Śūdra wife's son, if he is docile and well-behaved, only provision

for maintenance out of his estate (p. 704); the *sapiṇḍas* shall take the rest of the property (Bṛhaspati, p. 794). Among Śūdras the son born of an unmarried woman (*anūḍhāyam*, the reading of *Vivādaratnākara*, p. 542) or of an 'unauthorised' woman is like a legitimate son. The son of the Śūdra by a female slave or the female slave of a slave (*dāsadāsī*) shall receive a share according to the Śūdra father's wish (p. 704), but if the father dies before giving him the share, the brothers will allot him half-a-share, and if there are no such 'brothers' he shall take the entire property (Yājñavalkya, II, 134) unless daughters' sons exist to the dead Śūdra, who will have to be treated as legitimate sons. In the case of sons to Brāhmaṇas by slave women, they are only entitled to maintenance (Medhātithi, IX, 179).

Share of Son born after Partition (*Vibhaktaja-vibhāgaḥ*)

If a partition has been made between a father and his sons during his (*i. e.* father's) lifetime, the father gets a double share (Medhātithi, IX, 216). If a son is born after this partition, or sons, they will inherit only the father's share. But if there has been a reunion of some sons with the father, the shares will remerge, and the sons born after partition will only get such share as any other son gets, in the remerged group. The self-acquired property of the father, taken by him on division with his sons, will go after his death to the son or sons born after partition. Separated brothers have no concern with each other, after the partition in regard to property, debts, gifts and pledges etc., which have had to be taken into account before division. Their only contact thenceforth is pollution for birth and death among cognates (Bṛhaspati, p. 705). If, when a partition takes place, a son is in the womb and is not suspected to be so, and is born after the partition takes place, he must get from the divided brothers a share which will be equal to theirs, after a redivision. The case of a son conceived after partition is different. He can get only his father's share, and none of the divided brothers' (Lakṣmīdhara, p. 706).

Revision of Partition (*Vibhaktāgata-vibhāgaḥ*)

When an heir, whose identity can be established by testimony, turns up after partition has been made in his absence, he must get a share of what had been his father's father's property. He may have long been away from his native place, and the partition taken place in his absence. His share must be given to him by the others, if he comes and claims it, or to his descendants, even upto the seventh degree, if they do so. It has been ruled (by Devala, Jha, II, p. 601) that there can be no repartition after the fourth degree, but this refers, as pointed out by Caṇḍeśvara in *Vivādaratnākara* (pp. 540-541), only to cases where all coparceners have lived together, and not to cases in which coparceners have gone out of view in a foreign land or in accessible places, and the partition has had to take place without them.

Description of Types of Sons (Putralakṣaṇam)

Lakṣmīdhara deals with the rights of different types of sons (*putrāḥ* before describing the types. The description of classes of sons and of the glory and value of sons, should logically precede the description of their rights to heritage.

There are thirteen types of sons. These are (1) *aurasa;* legitimate son; (2) *kṣetraja* or 'soil-born' son, begotten on wife by another than the husband; (3) *putrikāputra*, son of an appointed daughter (*putrikā*), who is treated as a son; (4) *paunarbhava*, son of a remarried woman (widow or wife abandoned by husband), whether virgin or not; (5) *kānīna* (maiden-born), the son of an unmarried daughter, born of lust secretly, in the father's house who may be the son of a father of the same caste as his mother or not; (6) *guḍhotpannaḥ* (son born in secret), the son born in a house without any one knowing who procreated him; (7) *Sahoḍhah* (received with bride), the son of a girl who was pregnant at the time of marriage, without its being known or not, to the husband; (8) *Dattakaḥ* the gifted son, or adopted son; (9) *Krītaḥ* (bought son), *i. e.* the son bought of either or both his parents, whether of the caste of the buyer or of lower caste; (10) *Svayamupāgataḥ* (self-offered), *i. e.* a parentless boy who offers himself as a son and is accepted as such; (11) *Apaviddhaḥ* the cast-off or forsaken son, accepted as a son by another; (12) *Kṛtrimaḥ*, or appointed or created son; (13) *Śūdrā-putraḥ*, the son of a married or unmarried Śūdra woman, born of lust to one of a higher varṇa and termed also as *pāraśava* ('a living corpse') or *Śaudra.*

The order of the enumeration of the thirteen types of sons by Lakṣmīdhara is not throughout that followed by Manu, Yājñavalkya and Nārada, and the thirteenth (*Śaudra*) is not included in the list of "sons" by Gautama, Hārīta, Yājñavalkya, Nārada, Viṣṇu and Yama. *Kṣetraja*, who comes second in his list, gets the second or third place in the smṛtis. *Putrikāputra* who comes second or third in all lists except Gautama's, is second in Lakṣmīdhara's. The fourth place given by him to *paunarbhava* is so assigned by Viṣṇu, Vaṣiṣṭha, Śaṅkhalikhita and Yama. He follows Vaṣiṣṭha and Viṣṇu in giving the adopted son of modern times (*dattaka*) a low place, *viz.* the eighth. Manu did not include *putrikāputra* in his list. *Saudra* is, according to Nandapaṇḍita, *yatra-kvacanotpādita* (procreated anywhere) of Viṣṇu. Bṛhaspati recognises that the only sons that can continue the line (naturally) are the *aurasa* and *putrikā.*

Śaṅkhalikhita (p. 712) count *aurasa, kṣetraja, putrikāsutaḥ, paunarbhavaḥ, kānīna* and *guḍhotpannaḥ* as *dāyādāḥ* (kinsmen and heirs) belonging to the same *gotra* as the father and grandfather, and partaking of their *piṇḍa* and water offerings, and their property. Their rule of the division of the inheritance is this: make ten shares of the property: of these two should go to the father, two to the

aurasa, three to the *kṣetraja* and *putrikāputra* together (*i. e.* 1½ shares each), and one each to the rest. The *uddhāra* to the eldest son should go to the eldest *aurasa*, and if he is not existing, to the *kṣetraja* and *putrikāputra*. If the six do not exist, the other six whom Śaṅkhalikhita do not recognize as heirs may get shares according to differences in their qualities (p. 712).

Gautama places the order of succession to property as follows: *aurasa*, *kṣetraja*, *datta*, *kṛtrima*, *guḍhotpanna*, and *apaviddha*. The others inherit, in the absence of an *aurasa* son, an one-fourth. *Vivādaratnākara* (*inf*, p. 713) explains that the difference between the rule given by Gautama and that laid down by Śaṅkhalikhita is due to the stress on sons of the same or of different *varṇas* from the father, whose property has to be inherited. Vasiṣṭha (p. 713) declares that the six (preferred by Śaṅkhalikhita above) are relations and dividers in heritage (*dāyādāḥ*) and saviours of the ancestors from 'grave fear' (*mahato bhāyat*). Gautama declares the *sahoḍha* to be the first among the relations who are not coparceners (*dayādāḥ*) (p. 713). Lakṣmīdhara ascribes the exclusion of *paunarbhava* and others from inheritance as only intended to exclude those who are not of the same *varṇa* as the person whose property has to be divided (p. 713), as explained by Kātyāyana thus: on the birth of a legitimate son (*aurasa*) the other sons are entitled only to a third (or fourth) part of a share, if they are of the same caste as the father, and, if not, only to maintenance. Caṇḍeśvara notes that in Vasiṣṭha's text the others are assigned only a fourth of a share, whereas Kātyāyana will give them a third of a share, and this differentiation is due to the higher proportion being for sons with superior qualifications, and the provision of bare maintenance for those who do not belong to the *varṇa*, and are not specially qualified. Mere subsistence is for those who are not of the father's *varṇa*. The estate shall be taken by the second six types of sons, when none of the first six types is available. Hārīta describes the first six as both heirs and kinsmen, while the last six are heirs but not kinsmen (p. 713). The *svayamdattaḥ* is termed '*sahasā dṛṣṭaḥ*' by Hārīta (p. 713). The first six are ordinary sons and the other six subsidiary sons. The subsidiary sons cease to be heirs as soon as an *aurasa* son is born. Viṣṇu notes that among the twelve sons mentioned in order by him (as by Lakṣmīdhara *infra*) each preceding son takes the heritage before the one that comes after him. The funeral cakes should be offered by each type of son, in the absence of sons of the preceding type (Yājñavalkya, II, 132).

Brothers and fathers do not inherit a man's property as sons do. (Manu, IX, 185). If there are more sons than one son in a group, they will all inherit and share the heritage.

He who giving up his family goes into another family is termed *kāṇḍa-pṛṣṭha*, the family, being termed *kāṇḍa*. The term is applied also, as opprobrium,

to the *svayamdatta* (self-offered son), the son who has been bought (*krita*) and the son of a *Śūdra* wife or concubine (*Śaudra*).

The son begotten on the wife of another man, after due sanction, whether alive and impotent, diseased or a eunuch, is *kṣetraja*. He has two fathers, the nominal and the real, and is held to belong to two families, with the right (according to Baudhāyana and Yājñavalkya II. 127), to offer *śrāddha* to both 'fathers,' to perform their funeral oblations and to inherit their properties (p. 721). Viśvarūpa (p. 721) notes that *niyoga* is forbidden to the Brāhmaṇa female only, and not to the male, and a Brāhmaṇa can beget a *kṣetraja* on a Kṣatriya female or females of lower castes. If the brother-in-law or other, who procreates a son on the brother's wife, has no son, the son so born is the son of both, inherits from both and offers *śrāddha* to both and is named *Dvayamuṣyāyana*; but if the authorised person has a son of his own already, and begets the son (*kṣetraja*) solely for the benefit of the brother, the son so born does not *always* inherit the property or do the *śrāddha* of both, unless there has been an express understanding between the nominal father and the procreator that the son will belong to both (Manu, IX, 538, p. 722). This is the interpretation of the Mitākṣarā and Caṇḍeśvara (*Vivādaratnākara*, p. 556). The smṛtis repeat the statement 'the soil without the seed can produce no crop; and the seed without the soil cannot grow.' Hārīta requires the first *piṇḍa* to be offered by the *kṣetraja* to his procreator, or the names of both fathers may be uttered in connection with the same *piṇḍa* (p. 723). When a legitimate son is born after the *kṣetraja* (*i.e.* in the father's lifetime), the *dvaimuṣyāyana* shall take half the property of both fathers (Nārada, p. 723).

Śaṅkhalikhita say that one may not like to marry a *putrikā*, when she is an only daughter also, as her son may be treated as the son of his father-in-law, and not his (p. 724). The *putrikā* inherits the *strīdhana* of her mother. If a son is born to the *putrikā*'s parents, after her appointment as *putrikā*, and this son dies sonless, his shares will go to the *putrikā* as she is equal to a full brother. Manu rules that the son of a *putrikā* should offer the first *piṇḍa* to his mother, the next to her father, and the third alone to his father (p. 728).

The son of a woman who has been deserted by her husband or has been widowed and then marries again is *paunarbhava*. She may or may not be a virgin at remarriage (Yājñavalkya, II, 130, p. 728). The remarriage may take place if the first husband is impotent (*klība*) or an outcaste (*patita*). Her son belongs to his begetter (Kātyāyana, 860).

The *kānīna* is the son of an unmarried woman, who begets him from lust (*kāmāt*). If her paramour is of her own *varṇa*, the son becomes the heir of his maternal grandfather (*mātāmaha*, p. 729). If a girl whose has been married

but the marriage rites have not been fully performed (*asamskṛtā*), if she begets a son by another, the son is a *kānīna*.

The secretly born son (*guḍhotpannaḥ*) is the son of a married woman, who has had connection with many men, and does not know by whom she was impregnated. If they have been all of her *varṇa*, this son shall be treated as his mother's husband's (p. 730).

If a girl, already pregnant, who has been married as if she was a virgin, and gives birth to a son, he belongs to the man who married his mother. He is *sahoḍha* (obtained with the wife).

The Adopted Son (Dattakaḥ)

According to Manu (IX, 168) if the mother *or* father gives away a son (to another) with water libations (to sanctify the gift), a worthy son of equal *varṇa* (*Sadṛśam*) to another man, in times of distress (*āpadi*) as his son, that son must be regarded as 'adopted' (*dattrima*) or 'given' (*dattaka*). Medhātithi interpretes *sadṛśam* as 'equal by virtues, *not* caste,' and affirms that it is open to give a *kṣatriya* as a son to a Brāhmaṇa. The 'time of distress' is interpreted as 'times of famine' or the adopter's distress by want of offspring (Aparārka, 738). The distress must be of the recipient, not of the donor, *i. e.* when he has no son. *Vīramitrodaya* (p. 609) holds that one who gives away his son under normal circumstances incurs sin. Kullūka and other commentators hold that the boy must be of the same *varṇa* as the adopting father, as against the view of Medhātithi that a *kṣatriya* son may be adopted by a Brāhmaṇa. The śloka of Manu, as given by Lakṣmīdhara, has '*mātā pitā vā,*' which means that *either* parent can give away the child, but it is pointed out by Medhātithi that the child belongs to both parents and cannot be given away by one of them without the consent of the other. In Yājñavalkya (II, 130) the word *vā* appears, and it implies that *either* can give the child away, but in view of the definite ruling of Vasiṣṭha (below) that 'the wife cannot give away or adopt except with the permission of the husband' this clause or condition should be added, and the mother's adoption of a boy is valid only when the father is no more. *Bālambhaṭṭi* states that if the adoption is *urgently* needed, the boy may be given away by the father without the mother's consent (Jha, II. p. 214); if the mother is dead or insane the father can give away the child, and if she is all right and in the house, it can be done only with her consent. *Vyavahāramayūkha* notes that it is only a boy, not a girl, that can be adopted (pp, 107-109), as is shown by the use of the masculine pronoun in Manu's text.

Manu (IX, 141-142) adds that the adopted son, if endowed with good qualities, should inherit the adopter's property even if he comes from another

gotra (*anyagotrajaḥ*, p. 731).

The adopted son takes the *gotra* of the adopting father. The *piṇḍa* (funeral cake) follows the *gotra* and the property. The spiritual reason for adoption is to secure for a sonless man the funeral offerings from a son got by gift (*dattaka*), *i. e.* by adoption. The cynical view of J. D. Mayne (*Hindu Law*, 9th ed. p. 131) that notwithstanding the spiritual benefits that are supposed to follow from the practice, it is doubtful if adoption would have been heard of, if the adopted son did not also become an heir. "Paupers," says Mayne, "have souls to be saved, but they are not in the habit of adopting." Mayne reads the present into the past.

"The whole Sanskrit law of adoption" remarks Mayne, "is evolved from two texts and a metaphor. The texts are those of Manu and Vasiṣṭha. The metaphor (if it is not itself a mistranslation) is that of Śaunaka that the boy to be adopted must be the *reflection* of a son." (ib. p. 137)

The rules of Vasiṣṭha are as follows :—

"Man is formed of uterine blood and virile seed, and proceeds from his father and his mother as an effect from the cause. (Therefore) the father and the mother have the power to give, sell or abandon (sons). *But let him not give or receive in adoption an only son*, for he must remain to continue the line (*santāna*). A woman should not give or receive a son, except with the sanction (*anujñā*) of the husband. He who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt offerings (*hutvā*) and reciting the *vyāhṛti* rites take as a son a not remote (*adūrabāndhavam*) kinsman, and one just the nearest among the relatives." (pp. 736-739)

The reading *asannikṛṣṭam* ('who has no near relations') is adopted by Lakṣmīdhara in the quotation from Vasiṣṭha instead of *bandhusannikṛṣṭa* ('in the presence of relations'). Caṇḍeśvara follows Lakṣmīdhara, and the *Vyavahāramayūkha* follows both.

The prohibition of a wife adopting without her husband's permission is interpreted as relating to a sonless widow, whose husband died without giving her permission to adopt. Mitramiśra (*Vīramitrodaya*, p. 609) takes the prohibition as applying only to a widow, who has co-wives with sons, since, for ritualistic purposes, a co-wife's son is as effective as an own son. If the widow was the only wife of the deceased husband, and is sonless, she *must* make provision for her *śrāddha* and funeral rites, and she may therefore adopt a son even if she had not obtained the husband's permission. *Vyavahāramayūkha* (p. 120) will permit her to adopt with the sanction of the 'father,' *i. e.* the husband's father.

Kālikāpurāṇa is cited for two rules: a boy whose *saṃskāras* from *jātakarma* to *cūḍākaraṇa* have been done in the parental home cannot be adopted,

and therefore the boy to be adopted must be under five years of age. According to Śaunaka the adopter and the adoptee must be of the same *varṇa*, though, it may be remembered that Medhātithi allows a *kṣatriya* to be adopted by a Brāhmaṇa. He also prohibits the adoption of an only son, which is in accord with the high praise Manu bestows on the son. *Vyavahāramayūkha* rejects the verses from *Kālikāpurāṇa* as unauthentic, and holds that the prohibition can apply only to adopting a boy of a different *gotra*. In the three *dvija-varṇas* a boy whose *upanayana* has been done cannot be adopted, and among Śūdras a married man cannot be adopted.

Another rule of Śaunaka is that the boy adopted must be *putracchāyā*, 'a reflection of a son.' This is explained by Nandapaṇḍita thus: the resemblance lies in the possibility of being procreated by the adopter himself, as by *niyoga*. A brother's son, a sapiṇḍa's son or a sagotra's son can be adopted, because offspring can be raised on their wives by *niyoga* by the adopter. But sex relations with the mother, grandmother, sister, daughter or mother's sister will be barred as incestuous. So none of their sons can be adopted, *e.g.*, a brother, an uncle, a nephew, a grandson by the daughter or a half-brother. The rule contravenes natural sentiment which will favour the adoption of a sister's son, or a younger brother, or a grandson by a daughter.

Though adoption is said to sever the adoptee from his natural family, the relationship continues in some respects. The adopted son cannot marry a girl of his old *gotra* as he cannot marry one of the *gotra* of his adopted father. The adopted son has to observe death pollution for his natural parents. The adopted son can do his natural father's *śrāddha* if there is none else to do it.

Notwithstanding what has been said above, Śaunaka allows a Śudra to adopt his daughter's son and sister's son (Jha, II. p. 219). The religious rites that have to be done when an adoption is made have raised doubts as to the competence of Śūdras to make adoption. The objection is met by the argument that the Vedic rites might be done for Śūdras through Brāhmaṇas. The rites are indicated in *Vyavahārāamayūkha*. The *upanayana* of the adopted son has to be done in the house of the adapting father. Among Śūdras, as there is no *upanayana* the upper limit for adoption is held to be the marriage of the adopted boy, who must be married only after adoption.

Putratvavicāraḥ (Consideration of Filial Relationship)

Lakṣmīdhara discusses on the basis of authorities, the nature of fiilial relationship (pp. 737-740). If a wife is impregnated by one other than the husband, and gives birth to a son, to whom does the son belong, and whose line does he extend? Vasiṣṭha has stated the divergent views on the subject:

"Some say that the son belongs to the owner of the soil (*i.e.* the wife), and others to the begetter." The risk of a man losing the advantages of sonship is shown in a Vedic passage cited by Āpastamba (p. 737). " Guard carefully your line lest a stranger's seed be sown on your soil ; in the next world the son belongs to the procreator, and an imprudent husband finds sons thus begotten of no help to himself." Manu declares (IX, 35) that the seed is more important than the soil, and the bestower of the seed marks the character of the offspring. The plant that grows on a field shows the features of the seed. Never therefore should a prudent, wise and learned man sow his seed in foreign soil ; to do so will shorten his life and that of his line. Husband, wife and son should be one. In cattle it is not the owner of the male animal that gets the offspring. Men who procreate on the wives of other men benefit only the owners of the women. If no agreement has been made with the owner of the soil (*kṣetra, i.e.* the wife) the benefit (of procreation) goes to the owner of the soil, as the receptacle (*yoni*) is more important than the seed (*bīja*). This is the law (*dharma*). Śankhalikhita declare (p. 739) that if the sowing is done on a field without the knowledge of the owner of the field, the crop belongs to the owner of the field only, though there is difference of view about it. (p. 740).

Extension of Sonship (*Putrātideśaḥ*)

Among brothers born of the same father, if one has a son, all are declared 'be with son', through that son. Among co-wives, if one begets a son, all are said to have become mothers of a son (*putravatī*). It is on this ground that neither *niyoga* nor *adoption* is regarded as proper, *i. e.*, none can be adopted so long as a brother has a son to carry on the line. This applies only (according to Bṛhaspati) to full brothers (*sahodarāḥ*). If one full brother has a son, he can offer *piṇḍa* to all the brothers of his father (p. 740).

Etymology of the word Putra (*Putraniruktādi*)

Putra, meaning son, is derived from *put* (Hell) and *trā* (to protect). The son saves the father and ancestors from falling into or sojourning in Hell, by performing the enjoined *śrāddha* and making offerings of funeral cakes (*piṇḍa*). The family traditions for virtue, learning etc. must be continued through sons, grandsons etc. This is expressed rhetorically by Viṣṇu thus : " Through a son he conquers the worlds, through a grandson he obtains immortality, and through a son's grandson, he gains the world of the Sun." (p. 742) Vasiṣṭha declares " there is no place (in Heaven) for one destitute of sons." This is why Bṛhaspati advises a man, who has no offspring, to get a son *by any means* (*yādṛk tādṛik prayatnataḥ*). Doing *śrāddha* at Gayā makes ancestors attain salvation. So they exclaim being afraid of sojourn in Hell—" May we have male descendants to enable us to get away from Hell."

The Despised Son (Ninditaḥ)

The son born of mere adultery to one who *acts* like a harlot or *is* one professionally is the despised son *(ninditaḥ)*.

Intercourse with a brother-in-law by a woman *when she already has a son* is not authorised, like *niyoga* ; it is mere adultery. *Niyoga* in a form not authorized is similar, as the son of a woman who begets him in a manner not authorized is not entitled to the property of his mother's husband (Manu, p. 744). Gautama includes in this class the son begotten by a wife to a stranger, when for *niyoga* a brother of her husband is available. If a woman has committed adultery for money, the sons may offer *piṇḍa* to the procreator if they know his identity. Among sons of a woman who has remarried or taken a paramour after the death of her husband, each shall take of her property what may have come from his own procreator *(pitryam)*. This rule of Manu is described as applicable to *aurasa*, and *paunarbhava* sons, by Kullūka, and to sons of harlots, remarried women and free-living women *(svairiṇī)* by Caṇḍeśvara (p. 745), following the *Pārijāta*. The property of the two partners of the woman is what has passed into her possession and is contended for by the sons.

Division of the Property of the Sonless Man

If the widow of a man, who has died without leaving issue bears a son for him through *niyoga* with the younger brother or sapiṇḍa of the husband (*sagotra*) she must deliver to the son so raised the entire property of the dead husband, and not take any of it herself. A *chaste* sonless widow is alone to offer the *piṇḍa* (cake) to the dead husband. A widow desirous of *niyoga* relationship is not one who will be faithful to the bed of the dead husband. As Aparārka (p. 745) explains, such a widow will inherit her husband's property entirely (*samagram*), even if preference to the father and brother of the husband. The same rule is stated by Bṛhaspati (not cited by Lakṣmīdhara) thus : " in the absence of the son, the wife ; in the absence of the wife, the own brother ; failing him it goes to the inheritor (*dāyadaḥ*) ; and last of all it goes to the daughter's son (Jha, II. p. 449).

A special plea for the right of the wife is contained in a famous passage of Bṛhaspati, cited in full, on p. 746. " In the revealed Veda (*āmnāya*), in smṛti, and in popular usage the wife has been declared by wise men as half the body of the husband, and his co-partner in the fruits of merit and demerit (*puṇyāpuṇya*). Half the body survives, when the husband is no more and the wife is alive. How can any one take the property when half the body of the husband survives in her ? Even if the kinsmen, father, mother and full brothers of a sonless man be alive, after his death, the wife must succeed to his share (*bhāgahāriṇī*). The wife who predeceases a husband takes away his consecrat-

ed Fire, (for *agnihotra*). The chaste wife must inherit his wealth. Such is the eternal law. After inheriting his movable and immovable property, his gold and base metals, his grain, his liquids and clothes, she shall have his monthly and annual *śrāddhas* done. She shall honour (*pūjayet*) her husband's paternal uncles, teachers, daughters' son and maternal uncles, as also venerable and helpless persons, guests (or blind persons) and women by funeral offerings and grain. If agnates or cognates inimical to her, injure her property, the king shall punish them as thieves."

If there is no son or wife, the daughter shall inherit the father's property, since son and daughter are both offspring and both extend the line (Nārada, p. 747). Manu asks how can any one else take the property when, in the absence of a son, there is the daughter, and she (like the son) is the father's (surviving) self? Whether she is appointed as a *putrikā* by her father or not, the daughter of the same *varṇa* as the father, married to one of the same *varṇa*, and who is gentle and devoted to her husband, shall inherit the father's property (Bṛhaspati, p. 747). The *putrikā* is 'appointed' on the understanding that her son will get her father's estate; if she is sonless, she must take her father's property herself (Medhātithi, IX, 130), even before her mother and in preference to her (*Smṛticandrikā*, p. 687).

If a man dies leaving neither wife nor son (or daughter v. l.) and the son is dead, if born, his mother gets his property, and by his (or her) permission his brother, after her (Bṛhaspati, p. 747). Jīmūtavāhana (*Dāyabhāga*, p. 186) explains that this rule should be construed as referring only to cases where the deceased has left no son, wife, daughter, daughter's son or father. Manu states the right of the mother to get the son's property by inserting the condition that the son must have died issueless (*anapatya*, p. 748). Caṇḍeśvara holds that the father's mother can succeed only in the absence of the father (p. 591).

If the father's mother is no more at the time, the father's father gets the property, or according to some the latter precedes his wife (*i. e.* the paternal grandmother) in inheriting. Mitramiśra declares that 'the point must remain undecided' (p. 632). Raghunandana (*Smṛtitatva*, II, p. 195) gives precedence to the paternal grandfather over the grandmother.

The decisions on the rights of brothers to succeed are stated in a manner that may cause confusion. Thus, Gautama (p. 748) states "among re-united coparceners, if one dies, his share goes to the eldest". Caṇḍeśvara explains this as referring to cases in which the wife, mother and father, who have claims of precedence to brothers in inheritance, are not alive at the time. Manu has ruled that in succession to a sonless man the mother and father of the person shall inherit, one in the absence of the other. (p. 748): and in another verse

he has stated that the father and brothers succeed to a sonless man's property (p. 748).

Lakṣmīdhara has quoted Paithīnasi (p. 748) for the dictum: "If a man dies sonless, his property goes to his brother; in the absence of the brother, his mother and father shall receive it, or his junior wife ('senior', according to another reading), then the *sagotra*, the pupil and fellow pupils." As this ruling has hiatuses that can be filled up by the clear statement of Viṣṇu (cited on p. 750), Lakṣmīdhara notes that, in accordance therewith, the wealth of a sonless man goes to the wife, even if there are brothers, if she is faithful to her husband etc., but if a wife (senior or junior) does not conduct herself in this virtuous way, the property will go to the brother, even if she is alive and available to take the heritage; and he adds the further explanation from Nārada that "the brothers of a dead man shall make provision for the widows of a dead brother, in case they are loyal to his bed (*i.e.* continue chaste) in the way of maintenance, and (discontinue it), if they are disloyal to the dead husband." In regard to the dictum of Yājñavalkya (II, 135), cited on the next page, laying down the order of a succession serially as wife, daughters, parents, brothers, their sons, sagotras, *bandhus*, disciple, and fellow students, each succeeding one getting the property in the absence of the preceding one, Lakṣmīdhara holds that the right to inherit given to the parents, when brothers are alive, is only as regards ancestral property (held by the dead man, and inherited from grandfather), and that in regard to property acquired by the dead man, by himself without prejudice to the property of the parents, the right to succeed to it vests only in the brothers. (See *Jha*, II, 458) "What Yājñavalkya has declared regarding the title of parents being superior to that of brothers refers to ancestral property alone," says Caṇḍeśvara, following, as usual, Lakṣmīdhara (*Vivādaratnākara*, p. 598). The citation from Devala (p. 748) that full brothers should divide among themselves the property of a sonless man, or equal daughters, or the father, if he be alive, half-brothers of the same caste, mother or wife *in due order* (*yathākramam*), is described by Caṇḍeśvara (*inf*, p. 749), as explained away by Lakṣmīdhara, by describing the dicta of Yājñavalkya and Viṣṇu (cited by him on p. 750) as *later* than Paiṭhīnasi; and Devala's, and as over-ruling them. The citation of the views of Paiṭhīnasi and Devala *before* those of Viṣṇu and Yājñavalkya can be construed as indicating the acceptance of the latter, by Lakṣmīdhara, as *final* (*siddhānta*). The ruling of Viṣṇu is: "The order of succession is this, in regard to a sonless man: wife, daughter, mother, father, brother, brother's son, *bandhus*, *sakulyas*, fellow-students, and the king, and if the property is a Brāhmaṇa's, what would go to the king should go to other Brāhmaṇas." The order of succession given by Yājñavalkya (II, 135-136) is as under: wife, daughters, parents, brothers, their sons, *sagotras*, *bandhus*, disciples, and fellow students. Bṛhaspati accepts this order; "after daughters and offspring of daughters the following shall succeed in

order: full brothers, their sons, *Sakulyas, bandhus,* disciples and learned Brāhmaṇas." The decision is apparently held to apply to Brāhmaṇas as the standard, as the king is omitted in the list.

In regard to what may be inherited by collaterals, it is directed (by Bṛhaspati) that half the *income* of the inherited estate should be set apart for the regular performance of the monthly, six-monthly and annual *śrāddhas* of the last owner.

Sapiṇḍas are defined by *Baudhāyana* (p. 751) as the great-grandfather, the grandfather, the father, oneself, full brother, son of a wife of equal *varṇa,* grandsons and great-grandsons. Among these a man, his son and son's son constitute sharers of oblations; the sharers of divided oblations are termed *sakulya.* On failure of all 'named' relations, the property of a deceased man goes first to his *sapiṇḍas,* and on their 'failure' to the *sakulyas,* and on their failure to his teacher, pupil, officiating priest and king respectively (p. 751). The king is enjoined to maintain Brāhmaṇa women (p. 751). 'Taking over (unrighteously) a Brāhmaṇa's wealth is taking poison' (Baudhāyana, 752), and the king should never take it. The king is similarly prohibited from taking over the property of gods (*i.e.* temples), *strīdhana* in its six varieties and the property of boys (*bālānām dhanam,* p. 752).

The king is enjoined by smṛtis to look after the properties of minors, during their minority or scholastic life (either directly or through relations) and (Manu, VIII, 27) Viṣṇu (p. 753) asks kings to protect boys and women without protector (*anāthastrī*). The king is also to look after the property of minors (*i.e.* boys under sixteen) and that of Vedic scholars and wives of soldiers (who are out of the country). The property of minors, with accruing profits, shall be kept carefully by the king till the owner attains the age of majority (Baudhāyana, p. 753). Property that has lost its owner goes to the king (Śankhalikhita). It is the duty of coparceners to look after the property of any one of them who has gone abroad (*proṣita*). When a man dies leaving sons under age (*bāla*), he and the property that is his should be guarded by his *bandhus.* Medhātithi states that it is the king who must select from *bandhus* the proper guardian for a minor, when they compete for guardianship (VIII, 27). He should administer a minor's estate as it were his own (*bāladhanam rājñā svadhanavat pālanīyam*). The king's responsibility extends to taking care of childless women, or women whose families have become extinct, *i.e.,* who have no relations to look after them and persons afflicted with grave disease. (Manu, VIII 28-29)..

Responsibility for Funeral Offerings

Capacity to offer *piṇḍas* to dead relations and heirship go together. The

inheritor of a property has to do the *srāddha* for the dead person and also offer *piṇḍa* to him, and ancestors upto three generations. The *sapiṇḍīkaraṇa* ceremony should be done for brothers, brothers' sons by *sapiṇḍas*, and by pupils for dead *gurus* (p. 754).

In the case of a *vānaprastha* (forest-dweller or hermit) the property should go to his *ācārya* (teacher), or his pupil may receive it. A teacher inherits the property of hermits, the renunciate (*yati*) and the perpetual acolyte (*brahmacārin*) ; and so in sequence the good students (*sacchiṣya*), brothers in spiritual learning, associate and in religious pursuits (*dharmabhrāta*). (Yājñavalkya, II, 137, p. 754).

Partition after Reunion (*Saṃṛṣṭivibhāgaḥ*)

Reunited coparceners inherit to each other (*paraspara bhaginau*). *Smṛticandrikā* explains that reunited full brothers are those primarily meant by this rule. In the absence of a reunited full brother to a dead (reunited) coparcener, the other non-uterine partners will inherit his share.

The general rule about shares in a redivision is stated by Manu (IX, 210-212). When reunited partners divide again, there shall be 'equal' shares. The rule has to be understood as between brothers by same *varṇa* mothers ; in case they are by mothers of different *varṇas*, like a Brāhamaṇī and Kṣatriyāṇī, the new shares will be like the old. The insistence on 'equality' in repartition means only that no preferential share shall go to the eldest, *i. e.* no *uddhāra*, in redivision. Aparārka considers that in redivision each coparcener should get a share proportionate to what he brought into the common stock (Aparārka, p. 748). This will in effect mean unequal shares but the equality consists on insistence of none getting a special share in virtue of his being the eldest son. *Vyavahāramayūkha* states that some deny even this sharing of what he has brought into the common stock. If one of the reunited coparceners dies, or becomes a *sanyāsin*, or dies childless and a widower, the share, such as he would receive, will go to his full brothers in the redivision, and some share to a full sister, if there be one. (Bṛhaspati, p. 755). If during union (*samsṛṣṭi*) a partner had brought into the common stock his gains of learning and of valour, he must get a double share in recognition of it. If a reunited member has no issue, his share goes, according to the *Dāyanirṇaya* (22.2.1), to the others. *Strīdhana* is excluded from the division according to Śaṅkha (p. 756). In the redivision, the widows shall, if chaste, be maintained by the other sharers all their lives. An unmarried daughter shall get her father's share for maintenance, and after marriage her maintenance will be the duty of her husband only (p. 756). A *samsṛṣṭin* is one, who having become separated, comes of his own accord to live with his father or brother. If, when so living together, the father begets another

son, that son should get a share (Viśvarūpa, *inf.* p. 756), and if the new son dies, his share should go to a full brother. If a posthumous son is born to the reunited brother, that son should get from the latter his father's shares (Aparārka, p. 757). A non-uterine brother will not get the share of a non-full brother, even after union, and a full brother will get the share of a full brother, even though not united. This is an exception to the rule that when a man dies without a son, his property goes to his wife. The present rule states an exception to it, when the death occurs after union. The shares of reunited coparceners must go to the copareners that survive; and the shares of those who are living apart to the others living similarly. This will be so only in the absence of wives and other heirs, who are entitled to receive the property (p. 757).

Establishment of Fact of Partition (Vibhāganiścaya)

When the legality (dharma) or the fact of a partition is questioned, the decision must be reached from the testimony of kinsmen, the deed of partition and the transaction of business separately. Thus, among undivided brothers religious duties are common, and after division they must be done by each separately. Giving and receiving cattle, food, houses, lands and servants, acquisition of wealth and expenditure are all separate for separated brothers. The acts of standing surety, making and accepting gifts and giving evidence may be noted, from facts, as evidence of partition, even apart from a document (Nārada, p. 758). The acts of giving evidence, of becoming a surety, of giving and acceptance may be done between one another among brothers, who have made a partition, and not by undivided ones (Aparārka). Yājñavalkya has described thus the means of establishing a partition that has been denied : " Among undivided persons, like brothers or married partners, or father and son no suretyship, or loan transaction or bearing witness is permitted. Those ", says Bṛhaspati (p. 759) ' who keep their income and expenditure separate, as well as their wealth, and engage in mutual lending and borrowing and trade with each other are without doubt divided. "

What Divided Partners can do (Vibhaktakṛtyam)

The position is stated thus by Nārada : If there are several descendants of a man who do their religious acts separately, transact business separately and the implements of work, and who are not doing business jointly, in case they desire to give away or sell their own shares they are free to do so, as they are masters of their own wealth." (Nārada, pp. 759-760). The separate religious duties are like ' the five great sacrifices. ' The restrictions of the freedom of even a divided member are stated under ' resumption of gifts etc. ' In *pitṛkapūjā* and *śrāddha* separately, ... worship of gods as well as ancestors (*pitaraḥ*) as in *dharma* one should include

A person who of his own accord has secured a partition and then resiles from it must be confined to his own share by the king and if he breaks the command he must be punished. Divided or undivided, all are equal in regard to immovable property, as coparceners, and none of them has the right to give away, sell or mortgage any part of it of his own accord.

In regard to the production of the deed of partition as proof of its having been made, Bṛhaspati has described the deed of partition as that drawn up by coparceners by mutual assent. It is termed *vibhāgapatram*.

Kātyāyana (893) holds that if a number of brothers have lived *separate* for *ten* years, they must be regarded as *separated*. He prescribes the *kośa* ordeal to establish the fact of partition, if it is denied (415).

Gambling and betting (Dyūta-samāhvaya)

According to Nārada *dyūta* is artful playing with dice etc., while betting (*samāhvaya*) consists in sporting with birds and other animals. What is done through inanimate things is gambling, and with animate betting. Ivory strips, lead, dice, *kuhaka* seeds are the instruments of gambling. In betting rams, bulls or other animals like cocks are made to fight and wagers are laid on the results of the fight. Prize fighting and wrestling are also included under *samāhvaya*. Both, and especially gambling, have been regarded as reprehensible practices, and people who become addicted to them will not easily give up the practices.

Manu's attitude to gambling is hostile. He describes it as 'open theft,' which, by its spread, causes the ruin of kingdoms and of princes who become gambling addicts. He recommends a king to put down both. "A wise man should not gamble even in amusement" (*dyūtam na seveta hāsyārtham api*). Commentators have explained the prohibition as in regard only to unlicensed, unsupervised and unauthorised gambling. It was widely recognized that gambling inflames passions, engenders quarrels and cruelty and leads to waste (Kātyāyana). If a king cannot put it down, he should atleast allow it only under supervision and control, openly and in supervised halls, which are easily recognizable by festoons and arches on the doorways, in order that they may be recognized as what they are, and avoided by respectable persons. A reason for allowing supervised gambling is to help in crime detection. The king is therefore asked to appoint a superintendent of gambling. This officer must watch the gambling and collect the amounts due to the state as well as to winners. He is to collect ten per cent of the winnings *from the loser*, who thus loses more than the amount staked. The winner should be paid within three weeks the amount won. Yājñavalkya (p. 764) will give the superintendent five per cent of the winnings also from the winner. A gambler who fails to pay what he has lost is

barred from entering the gambling saloon again [p. 766). The winner is free also to collect the winnings in any manner he chooses (Nārada, p. 766). This indicates a difference in practice in supervised gambling. One who gambles in unlicensed places or ways is to be fined.

It is natural that the superintendent of gambling should be offered small gifts by the gamesters, and he is permitted to accept such gifts, though the permission is coupled with disapproval. One who uses false dice is to be banished (p. 768), or be subject to mutilation. In disputes between gamblers the superintendent is the final authority.

Relative Validity of Transactions (Kriyābhedaḥ)

Before proceeding to treat of miscellaneous topics, Lakṣmīdhara has a small section on the relative validity of transactions (*kriyābhedaḥ*), pp. 771-772. A prior transaction must be upheld as against a later; if not, it becomes an alteration of the transaction. The revocation of an agreement and the making of another is an alteration of transaction. An earlier transaction is made void by a later; a subsequent agreement overrides a prior (p. 771, Bṛhaspati). In all civil disputes, (*vivādeṣu*), the later prevails, but in sales, gifts or pledges the prior predominates. In transactions relating to debt, the last is decisive. In sales, gifts mortgages, pledges and acquisitions the earlier prevail. When a person makes a deposit and later on converts it into a pledge, after receiving money for it, or sells it, the later act prevails over the earlier.

Prakīrṇakam (Miscellaneous Topics)

In works on *Vyavahāra* the last title or section is termed *prakīrṇakam* (miscellaneous matters). Topics not dealt with in the earlier sections are brought into this section. so that the book may be complete. Whether the section is large or small depends on the treatment of other topics in the earlier sections. *Nāradasmṛti* has a section on *prakīrṇakam*. which its translator (J. Jolly, S.B.E., XXXIII pp. 214 ff.) describes as meagre and not in keeping with the announcement made in the first four ślokas. "Under the head of *prakīrṇakam*," declares Nārada," are comprised law suits depending on the king such as transgressions of the king's commands, and obedience to his injunctions. Grants of towns, the division of the constituent elements of the State, the duties (and the reverse) of heretics (*pāśaṇḍi*), followers of the Veda (*i.e.* orthodox men), corporations of merchants and groups of kinsmen (*śreṇi-gaṇa*), disputes between father and son, neglect of obligatory penances, seizure of the gifts made to worthy persons, causing loss (*or* wrath, if the reading *kopa* for *lopa* is adopted) to anchorites, sins springing from mixtures of varṇas (by improper unions), rules about the means of living for mixed castes,—and in short, whatever has been omitted in the preceding titles of law are treated under the

head of *Prakīrṇakam* (miscellaneous)." (p. 773). Kātyāyana declares that in the section on *prakīrṇakam* are treated whatever has been omitted by him in previous sections and whatever is cut off from its context, and what is taken from other sciences (*paratantra*) and omitted before from its not suiting the context (944-946). Bṛhaspati (p. 775) states in his section on the topic that *ten* offences must be personally enquired into by the King and dealt with by him personally. Among them are the killing of cows and Brāhmaṇas, destruction of crops, adultery with another's wife (*paradārābhimarśaṇam*) and tax evasion and non-payment when due (p. 775). The King has also to investigate through secret agents (*cārā*) failure by persons to carry out enjoined expiations (*niṣkṛtīnāmakaraṇam*), transgression of a royal warrant of arrest (*ājñāsedha-vyatikrama*), transgression by subjects of the rules of *varṇa* and *āśrama* and failure to perform duties enjoined as such, accumulation of hoarded wealth (*nidhi*) by failure to use wealth properly, and sudden accession of wealth to paupers (p. 775). He should also take steps to prevent such irregularities or offences. He should take also effective steps to prevent the doing of acts prohibited by the *śāstras*. He should see to the proper disposal of suits instituted by complainants (*vādinām kriyāvādāḥ*). He must discover secret associations of subjects against the State, and see to the prevention of the spread of every practice or custom or act contrary to śāstras. All the four appointed means (*śama, bheda, dāna* and *daṇḍa*) should be used by him to overcome evil and evildoers in the kingdom (p. 775).

Maintenance of the Varṇāśrama system.

The rules of the system have have been elaborately described by Lakṣmīdhara in earlier *kāṇḍas* of the *Kṛtyakalpataru*. He now cites Yājñavalkya (I, 361) for the injunction to the king to discipline and put again on the right track all those who transgress (in his kingdom) the rules binding on families, castes or groups and stray from them. All the four means (*caturupāyāḥ*) are to be employed to overcome opposition and bring back to their appointed mode of life or conduct men of all *varṇas* and all stages of life (āśramāḥ).

If members of a *varṇa* go beyond bounds or fail to discharge appointed duties of the *varṇa*, they should be brought back to the right path (p. 775, Nārada). The State has its root in the King, obedient to the injunctions of Dharma, with Brāhmaṇas and Kṣatriyas as leaders of society (Śaṅkhalikhita, p. 776). Manu has ruled that the king should see to it that Vaiśyas and Śūdras discharge their appointed functions and thereby prevent the disintegration of society (p. 776). By his own loyalty to śāstraic rules and by his personal example the king should set an example to his subjects ' The world ', says Gautama, ' is upheld by the king and the Brāhmaṇa (p. 777) '. Accordingly both the king and the Brāhmaṇas should inculcate, and impress on the other *varṇas*, their ap-

pointed duties and functions, and the king should see that they are duly followed (Vasistha, p. 777). "By kindness, discipline and protection the king becomes the guide, controller and judge of all who transgress bounds. "The Teacher (*guru*) controls and guides the pupil, the King the law breaker, and the god Yama, son of Vivasvat, the judge and punisher of all who sin secretly or openly, in mind or in body." Those who escape the control and punishment at the hands of teachers or kings, cannot escape punishment by Yama and of being thrown into hell (Hārita, p. 777). The teacher (*guru*) prescribes appropriate expiatory rites to those who transgress religious duties or perform religious rites improperly or not at all. If the directions of the teacher (*guru*) are ignored or transgressed, the king must step in to see they are carried out and the defaulter punished. If the king himself transgresses rules of śāstra he must go to his *purohita*, who is a master of Dharma, and follow his directions for expiation (Āpastamba, p. 777).

Rules of Punishment

The punishments that may be imposed for violations of laws, state or spiritual, may extend to death (p. 778). They must be according to the gravity of the offence, and the age, education, caste (*varṇa*) and apparent qualities (*lakṣaṇaguṇanūgaḥ*, Saṅkha p. 778). The nature of the offence, the place of its occurrence, the time of its commission, the strength, age, profession and means of the offender should be considered in deciding on an appropriate punishment (Yājñavalkya, I. 368, p. 779). Viṣṇu (p. 779) advises the amount of damage done by an offender to be considered also in selecting his penalty (p. 779). If an offender has been let off for a first offence, he should not be allowed to escape punishment if he offends again; nor can the king pardon one who violates his duty (*svadharmam apālayan na adaṇḍyo rājñaḥ*, Viṣṇu, p. 779). In the case of an offender who admits that he uttered objectionable words in ignorance or carelessness or from rivalry or familiarity in—cases of abuse—the admission coupled with a pledge not to offend so again—will justify half the usual penalty (Uśanas, p. 778), *viz.*, a fine. No one is totally exempt from punishment for an offence committed by him, be he a father, a teacher, a friend, the mother or the wife or the domestic priest (Manu, VIII, 335). The king should restrain his anger when he has to deal with children, women, the aged and ascetics (p. 780). Reprimand, fines and corporal punishment are grades of penalties to be imposed according to the gravity of offences (Bṛhaspati, p. 781). Admonition, with the word "fie" (*dhik*), is for light offences, reproof for *pūrvasāhasa*, fine for middle *sāhasa*, imprisonment in a police lock-up (*rodhanam*) and in gaol (*bandhanam*) for offences against the king. Admonition and reproof may be ordered by the judge, but the king alone (or the judge with subsequent royal sanction) can impose fines and corporal punishment (Bṛhaspati, p. 781). A criminal may

be put in fetters or imprisoned. Publicity to the punishment of crime is advised so as to react on the public mind. Corporal punishment, according to Manu, can be inflicted only on *ten* named parts of the body, according to Manu, and on *fourteen*,, according to Bṛhaspati (p. 782). Yama will exempt Brāhmaṇas from corporal punishment and the death penalty (p. 783). Hārita forbids mutilation in the case of Brāhmaṇas (p. 783). The older smṛtis make the exemption of the Brāhmaṇa wider; thus, Gautama (p. 783) prohibits the infliction on Brāhmaṇas of the following penalties: corporal punishment, imprisonment, fine, exile, reviling and exclusion. Saṅkhalikhita will not allow a Brāhmaṇa offender to be tormented (not as torture, which is not allowed at all, but as a punishment), p. 784. Manu will allow him only to be sent out of society, and allows the branding of marks of infamy of his crime on a Brāhmaṇa's forehead for the most heinous offences (VIII, 381). Public disgrace as getting the head shaved, thereby removing the tuft, which is necessary for religious sanctity, public exposure and expulsion from society are alone allowed in his case.

An offence is both a crime and a sin. For both there are expiations: punishment for the first and 'religious expiation' (*prāyaścitta*), which involves guidance and co-operation from Brāhmaṇa. The Brāhmaṇa, who is driven out of society, for a grave crime is denied expiation, and being out of society, he cannot even get his food and shelter, and must be driven to death. To those who believe in rebirth, after this life, and according to the good or bad deeds done in this life, rebirth in various forms, according to the expiated or unexpiated crimes, is inevitable. These forms of rebirth in relation to offences are described by Manu and Yājñavalkya. Those guilty of the 'five great sins' (*pancamahāpātakāḥ*) are also prescribed expiations. Thus for stealing a Brāhmaṇa's gold, which is one of the five cardinal sins, the offender is advised to go to the king with a club in his hand and ask the king to strike him dead with the club (Manu, XI, 102), or, he has to do austerities in the forest for a whole year, as an expiation. He who commits adultery with his teacher's wife should, after confessing his offence (crime as well as sin) extend himself on an iron bed, made red hot, or embrace a red hot image of a woman and die; by death thus he is freed from the sin (Manu, XI, 104). Marking offenders with indelible signs indicative of their crimes, in the five great offences, is both for giving publicity, thereby excluding the offender from all possible association with good persons, who can help him in a expiatory rites, and for driving him out of family and society, receiving no compassion (*nirdayā*) and dying. But if penances are done, after a crime, and if appropriate fines are paid, the offender need not be marked indelibly with appropriate figures indicative of his crimes. (Manu, p. 785). Simple banishment with his effects are indicated to the Brāhmaṇa for some offences, while for similar offences the non-Brāhmaṇa will have his property confiscated and then banished. None should speak to one who has slain a

Brāhmaṇa (p. 786). Āpastamba (p. 786) allowed certain holy persons (*ācārya, ṛtvik, or snātaka*) to intercede to secure a remission of sentence. To prevent kings making money out of fines for crimes, the king is asked to throw fines or wealth obtained as punishment for great sins to throw it into water, as an offering to Varuṇa ('the lord of punishment, even over kings') or distribute it among learned Brāhmaṇas. Yama does not allow total confiscation of an offender's property and rules that a fourth of it must be left for the offender's descendants and dependants (p. 787).

Exposition of the principles of Punishment

A review of the principles underlying penal law is resumed by Lakṣmīdhara, after two sections dealing with tolls and ferry dues (*taraśulka*) and treasure trove (*nidhi*). It is natural that some attention to penalties should be brought in when dealing with the king's duty to maintain the system of castes and stages of life (*varṇāśramadharma*).

Daṇḍa is punishment, and the regulation of punishment is *daṇḍapraṇayana* is regulation (by rule) of punishment. Law and social order can be maintained only when those who go against both are brought to book. The aim of *daṇḍa* (punishment) is fourfold : prevention, deterrence, reformation and retribution. These are all implicit in the treatment of criminal law in Dharmaśāstra. A gradual change may be noticed in smṛtis from severely retributive types of punishment to preventive and reformative types. It obviously reflects the growth of settled social order. Penalties, which aim at publicity and ridicule of the criminal, like parading a criminal on the back of a donkey, with marks of his crime indelibly marked on his face, are obviously deterrent. In ordered society he who is hurt is not allowed to take the law into his own hands and attack the hurter, but the state takes up the matter either *suo moto* or on a complaint by either the police or the injured person. Smṛtis assume the deterioration in human nature with advance of *Kaliyuga*, and therefore make it the king's (*i. e.* the state's) duty discover perpetrators of crimes (by secret agents or the police) and punish them, in the interests of social order and security. The idea is expressed picturesquely. Punishment (*Daṇḍa*) is divinity, and the son self-born (*ātmaja*) of the Creator, filled with radiance and power. The King is identified with Daṇḍa (*sa rājā puruṣo* daṇḍaḥ). The figurative idea is developed. Daṇḍa watches over people, awake or asleep. Persons swerve not from their duties by fear of Daṇḍa. Daṇḍa is the means of social security, the upkeep of the regulations of *varṇa* and *āśrama*. The wise identify Daṇḍa and Dharma and regard them as identical (Manu, p. 794). A king must possess insight, knowledge, diligence and a sense of justice in order that he may administer Daṇḍa. He must have assistants to prevent offences, discover offenders and bring them for justice. The smṛtis exhort the king to rise to the height of his

moral stature in order that he may justify his claim to be 'an incarnation of Daṇḍa,' *i. e.* righteous punishment. A king who swerves from Dharma is struck down by Daṇḍa. Punishment, when inflicted justly, contributes to social security and happiness, but is destructive, when inflicted without judgment (p. 795). Failure to prevent or punish crime results in anarchy. A just king is in wisdom an incarnate 'preceptor of the gods' (Bṛhaspati), and in relentless impartiality in punishing a veritable god of death (Yama), says Angiras (p. 795). The administration of criminal law justly and wisely is like the performance by the king of numerous Vedic sacrifices (*yāga*), in spiritual result (Yājñavalkya, I, 359). *Just* punishment enhances a king's fame, and unjust destroys it. Neglect to exercise the power and duty ruins a king and the kingdom. If a criminal who must have been punished is allowed to escape, the king, as an expiation for his dereliction, must fast for a whole day, and his preceptor (who has to guide him) for three days (*Vasiṣṭha*, p. 796). Punishments must be graded. They must suit the offences as well as the conditions in which they were committed, such as being a first offence of the offender, or unintended. The punishments also should be graduated.

In a previous section Lakṣmīdhara mentioned the punishments prescribed for *six* categories of crimes, named by Nārada, *viz.* homicide, theft, violation of the chastity of the wives of other men and the two kinds of violence (*sāhasa*). It has already been noted that the administration of criminal justice is by the king on his own initiative, and not (necessarily) private complaints lodged in courts. Punishments are laid down for civil offences but they do not come within criminal law, but the standards of fine is the same for both classes, and is given in *Prakīrṇakam.*

Gradations of Fines

Fines are classed as three, the lowest called the first (*prathama*), the middle (*madhyama*) and the highest (*uttama*). The amounts indicating the limits in the three classes are given differently by different authorities. According to Śaṅkhalikhita the first ranges from 24 to 91 paṇas, the middle from 200 to 500, and the highest from 600 to 1000. Nārada gives them as not exceeding 24 paṇas, 200 paṇas and 1000 paṇas, the minimum for the highest being 500 (p. 806). Yājñavalkya gives highest 1080, as a maximum, half of it the middle, and half of the middle the lowest. Manu makes the three 250, 500 and 1000 respectively. The economic condition of the person fined has to be taken into consideration among the eleven points to be taken into account in deciding on punishments to be awarded. The other ten are the offender's *varṇa*, his age, past record, in the case of corporal punishment the place on which it is to be administered, the time of the offence and details of the offence to determine its exact nature. A first offender is to be treated more lightly than an old offender.

The punishment *rises* with the *varṇa* of the offender. The punishment for a Vaiśya, a Kṣatriya and a Brāhmaṇa are to be respectively twice, four times and eight times that for a Śūdra. It seems hard on the two highest varṇas as they were poorer than the Vaiśya. The implication is apparently that the Brāhmaṇa and the Kṣatriya should set up a higher standard of conduct than the other two varṇas, and it is enforced by the higher punishments to them if they offend. On the other hand there is the rule that in deciding on a penalty for an offender his economic condition should be taken into consideration. A Brāhmaṇa who is unable to pay his fine is expected to make up by labour, and if his fine is so high it will virtually mean serf labour for him. The old rule of Gautama (*infra*. p. 783) that the Brāhmaṇa should, among other exemptions, be exempt from fines seems to have changed later.

It may be presumed that the rates prescribed for the three classes of fines are immutable, and where the maxima and the minima are specified, there would presumably be discretion left to the judge to inflict a fine within the prescribed limits, after considering all circumstances. A solitary offender is to be punished according to the rules, but gangs of criminals will be punished by each member of the gang getting enhanced punishment, usually twice that for an individual criminal. Fines are not to be imposed on slaves, as they have no property.

Children, very aged folk, persons suffering from grave disease and women are usually exempt from the general rule of punishment, but a rich woman can be fined; and according to Kātyāyana (p. 803), a married woman can be made to pay a fine out of her *strīdhana*, while man can be beaten.

Immunities.

Nārada (p. 803) names the following as allowed to Brāhmaṇas without any liability to penalty: free access to the houses of others for collecting alms (*bhaikṣyahetoḥ*); freedom to collect fuel sticks for the sacred fire (*samit*); from other persons' property withont its being deemed theft, as also flowers, *kuśa* grass, water and the like needed for worship (*pūjā*); freedom to talk to women of other families without objection (*anākṣepa*); crossing ferries without having to pay tolls or ferry charges; precedence in being ferried over rivers; exemption from ferry dues for merchandize or goods carried by them. Śaṅkhalikhita (p. 804) add to the list these: collecting leaves for *pūjā* or religious rites, free access to holy places and shrines, (*daiva-tīrthābhigamanam*), carrying on roads weapons for self-defence, unresrticted right to seats, non-obstruction to continue what has been begun (*prasluteṣu anivāraṇam*), rcmaining in bad company suspicion free, gleanning grain from fields bordering roads, taking a seat before the king without being punished for discourtesy.

Except when they act against the king's interests, members of corpora-

tions or business men are free to act. A man's means of making a living, like the tools of a craftsman, the musical instruments and wardrobe of actors, ornaments, coats and clothes of 'public women' and weapons of soldiers cannot be taken away as punishment (p. 800). The intention is clear: impoverished persons are compelled to commit crimes for a livelihood and the State should not leave them penniless and bereft of making a livelihood by depriving them of their working equipment (Śaṅkhalikhita, p. 800).

This may be compared with section 60 of the Indian Code of Criminal Procedure.

Mitigation of Punishment

Self-defence is an effective answer to a charge of violence and even homicide. The rule against the slaying of a Brāhmaṇa is modified by making it justifiable for any one to kill a Brāhmaṇa, who has come manifestly with murderous intent, thus acting in self-defence. To reconcile this plea of self-defence with the laying of a Brāhmaṇa assailant, smṛtis have been at pains, as pointed-out in my article on *Ātatāyivadha*, to advise the attacked person to run away, and escape being killed. As already pointed out a Brāhmaṇa unable to pay fines, may commute it by his labour. Accident and hurting a person unintentionally or from sheer helplessness are to be considered in dealing with charges against a person, along with his past record (p. 797).

Partial or Total Mitigation of Punishment

A penalty imposed may be partially or wholly mitigated in some cases. Even one deserving a capital sentence may be let off on his paying a fine of a hundred gold coins, and one sentenced to mutilation for half this amount, and he who has been sentenced to lose his fingers for a quarter of the amount (Bṛhaspati, p. 801). Banishment, after forfeiture of all their property, may be accepted in lieu of a sentence, in the case of men of good families. A Brāhmaṇa guilty of a capital offence may be deterred from similar acts by imprisonment (p. 801). Banishment is the penalty for a Brāhmaṇa who is a perjurer or accepts wrong gifts (p. 802). Bhṛgu would impose the middle amercement in lieu of mutilation in cases in which the latter is the penalty prescribed.

Tolls and Ferry Dues (Taraśulka)

Manu (VIII, 404-405) indicates the standard rates of tolls payable (including ferry charges) at ferry stations, thus: a cart must pay a *paṇa*, a man with a load half-a-paṇa, an animal or a woman a quarter of a paṇa, a man without a load one-eighth of a paṇa. Carts with loads should pay *ad valorem*; men without loads and empties only a trifle.

Boat hire on rivers must be suited to distance and the time taken in transit

but for ships that ply on the sea standard rates for carrying men and goods are prescribed. A pregnant woman, an ascetic, a *vānaprastha* and students of the Vedas who are also Brāhmaṇas are free from ferry tolls. Medhātithi interprets this rule as making heterodox monks, *e. g.*, Buddhist or Jaina, liable to pay tolls. He who tries to evade a toll by swimming across the river is to pay a hundred times the toll. The following are free from taxes, and therefore of tolls: the King, a diseased and proectorless person, a young woman recently confined and her child, widows returning to their families after being widowed, virgins and messengers on errands of uregency (Vasistha, p. 790). A ferry or toll collector, who misappropriates the amounts collected, will be punished, as well as he who collects tolls or dues from persons who are exempt. In the last case, the amounts collected must be refunded. Damage done to goods in transit by the negligence of the boatman, or lost, must be made good by him, but the rule does not apply to cases of loss due to accident (Manu, VIII, 408).

Treasure Trove (Nidhi)

He who discovers buried treasure and establishes his right to it will be allowed to keep it, after paying the king from one-twelfth to one-sixth its value. He who makes a false claim to it will be fined one-eighth of its value. In regard to treasure found to be his, a Brāhmaṇa is free from paying the percentage due to the king in such cases. The discovery of treasure trove should be reported to the king. If it is proved to be his, he retains it or gets it back from the king, and not, if it is otherwise. Ownerless treasure goes to the king and the discoverer is paid one-sixth its value, but a Brāhmaṇa owing to his lawful duties is exempt from such a payment. Nārada holds the king to be the owner of all treasure trove (p. 792) and so notice of the discovery by ths finder is obligatory, as otherise the discoverer will be deemed a thief (and dealt with as such). Yājña-valkya while allowing a Brāhmaṇa who discovers buried treasure to keep it, allows Kṣatriya and Vaiśya finder to retain only half the treasure, the other half going to the king. If a king discovers buried treasure, he should give half of it to Brāhmaṇas, and retain the other half. A Vaiśya discoverer should give a fourth to the king, one half to Brāhmaṇas and retain a fourth. A Śūdra finder may retain one-sixth the found treasure, after giving the king and Brāhmaṇas five-twelfths each (Viṣṇu, p. 792). The king gets one-half of all ancient hoards, that are found.

Mines

Everything dug up from mines belongs to the king, and thus the state has a monopoly in mines. Kauṭilya asks the king to appoint a superintendent of mines. Manu will give the king one-half of all that a mine yields in metallic ore (VIII, 39, p. 793).

Group Names

In explanation of group names, Lakṣmīdhara (pp. 678-682) makes a citation from Kātyāyana (678-682): *Naigama* means a group of inhabitants of the same city. *Vrāta* means a troop of persons carrying weapons. *Pūga* means a group of merchants and the like. *Gaṇa* means a group of Brāhmaṇas. *Pāṣaṇḍāḥ* are ascetics who have forsaken their ascetic life. *Śilpinaḥ* means craftsmen. *Sangha* is the designation of a group of *ārhatas* (*i. e.* Buddhists). They are also named *Saugatāḥ*. *Gulma* is the name for a group of *caṇḍālas* and *śvapacāḥ* (cookers of dog meat). Bṛhaspati uses the term *vrata* to describe groups of all kinds. Persons born of unequal *varṇas* are termed *a-sajātīyāḥ*.

Standards of Measure and Money (*Mānasmjñā*)

Fines are stated in terms of various coins or measures. To elucidate them, Lakṣmīdhara has a small section (pp. 807-809). He cites Manu (VIII, 131-137), Yājñavalkya (I, 364), Viṣṇu (IV, 8-9), Bṛhaspati, Nārada and Kātyāyana. Vardhamāna's *Daṇḍaviveka* has summarised the available data (pp. vii-viii) more lucidly. Coins are of copper, silver or gold. The *paṇa* is a copper coin. *Māṣaka* is a silver coin. The *dīnāra* is a silver coin. *Niṣka* is a gold coin. Whenever a number is mentioned in regard to a fine, without description, it must be construed as of *paṇas*. Thus, to say "he should be fined a hundred" is "he should be fined a hundred *paṇas*. A *kārṣāpaṇa* equals sixteen *paṇas*. One-fourth a *paṇa* is a *kākinī*. A *dhānika* is equal to four *kārṣāpaṇas* or sixty-four *paṇas*.

When *māṣa* is stated as a coin, it means gold māṣa. A *māṣaka* is a silver coin. Coins are ingots of metal, going by weight.

A *gunjā* berry is equal in weight to two barley corns (*yava*) or twelve mustard seeds (*sarṣapa*). *Kṛṣṇala* is a black berry used as a weight, and weighs three *gunjā* berries (*raktika*). Sixteen *māṣas* of golds make a *suvarṇa*. In gold coins, sixteen *māṣas* or eighty *kṛṣṇalas* make a *suvarṇa*. Four *suvarṇas* make a gold *niṣka* or a *pala* of *gold*, and ten *palas* one *dharaṇa* of *gold*.

In silver, two *kṛṣṇalas* make one *māṣaka*, and sixteen silver *māṣakas* (or thirty-two silver *kṛṣṇalas*), make one *dharaṇa* of silver, also named *purāṇa*. Ten *dharaṇas* of silver make a *śatamāna* or 320 *kṛṣṇalas*.

Nārada states that a silver *kārṣapaṇa* is known in the South as a *raupya*.

Kātyāyana states that when a fine is mentioned in *māṣas*, silver *māṣas* are meant (p. 809), and so also if expressed as *kṛṣṇalas*.

Yājñavalkya (p. 808) states that a *pala* is equal to *four* or *five suvarṇas*.

Kātyāyana (p. 809) states that where a fine of fraction of a *māṣa* is prescribed, it should be taken as one *māṣa*.

Mixture of Varṇas

Manu has stated the position of the Brāhmaṇa as the first among the four *varṇas*, owing to his superiority of origin, his careful observance of rules of life (*niyamasya dhāraṇāt*) and the merit conferred by the *samskāras* he has undergone. The twice-born (*dvija*) are the Brāhmaṇa, the Kṣatriya and the Vaiśya as they are reborn by *samskāra*. The Śūdra forms the fourth *varṇa* and is so by birth alone, *i. e.* not raised by samskāras (p. 811), like *upanayana i. e.* initiation into Vedic study. *There is no fifth caste.* That is to say that last *varṇa* is residuary, and all who do not belong to the three other *varṇas* come under the fourth. Descent in normal and abnormal sex-unions, *anuloma* and *pratiloma* result in mixtures. The mixture of *varṇas* by sex-union creates new groups, and as *samskāras* are denied to many of them, these will have only the status of the Śūdra. Where the husband is of a higher *varṇa* than the wife, the children belong to the *anuloma* class; where the wife is of higher *varṇa* than her consort, the offspring will constitute the *pratiloma* class.

If the male in the union is a Brāhmaṇa three *anuloma* groups are possible, when the woman is one of the remaining three *varṇas*. Similarly, there will be two *anuloma* groups where the father is a Kṣatriya and the female partner a Vaiśya or Śūdra, and a Vaiśya husband of a Śūdra woman will create one anuloma group only. In all therefore there can be only *six anuloma* groups. As the unions are abnormal, Manu styles them as *apasada* or baseborn (X, 10). Children of a male of a higher *varṇa* and of a female of the next *varṇa* (in the traditional order) are called *anantara* (X, 14) " on account of the blemish (*i. e.* inferior status) of the mothers." The son of a father *two varṇas* above the mother is termed *ekāntara*, and the son of a father two steps higher than the mother is termed *dvyantara* (Nārada, p. 815). The terms are descriptive of the intervention of one, or two steps between father and mother, and are applied also to *pratiloma* (or " reverse " unions.) The son of a Brāhmaṇa woman by a Kṣatriya father is also termed *anantara*. The son of a Kṣatriya woman to a Śūdra is termed *dvyantara*, in the reverse order (Nārada, p. 816).

Pratiloma born persons are described by Viṣṇu as " despised by Āryas " (*ārya-vigarhitāḥ*), p. 817. The lowness or despicability is proportioned to the difference in step between the parents, being lower where the intervening group is one or two. *Pratiloma* births are described as due to infatuation (*moha*), by Paiṭhinisi (p. 818). Baudhāyana (p. 819) holds that those born from an intermixture of *varṇas* are *vrātyāḥ*, *i.e.* equal to outcasts. Manu declares (p. 824) that sons whom twice-born (*dvija*) men beget on wives of equal *varṇa*, *i.e.* their own *varṇa*, but who, by failing to discharge their sacred duties (*avratāḥ*), lose the right of initiation into *sāvitrī* (*i.e.* are not invested with the sacred thread in *upanayana*) are declared to be *vrātyāḥ*. Omission to discharge appointed duties

of *dvijāḥ* may be voluntary, and he who does so becomes a *vrātya*. Their children by women of their own natal *varṇa* will also be *vrātyaḥ* (Devala, p. 827) and must be excommunicated (*bahiṣkṛta*). This may be taken as an emphatic way of stating the obligatory nature of the religious duties imposed by their birth on the three higher *varṇas*.

In a famous passage Manu (p. 828) declares that through their omission to do enjoined religious acts (*kriyālopāt*) the following Kṣatriya born groups (*Kṣatriyajātayaḥ*) have sunk to the level (or status) of Śūdras: the Pauṇḍrakas, Coḍas, Dravidas (v. l. *Coḷa-Drāvidaḥ*), Kāmbojas, Yavanas, Śākas, Pāradas, Pahlavas, Chīnas, Kirātas, Dāradas and Khaśās. An Āryan's birth is revealed, says Manu by his actions, more than even by his appearance. Behaviour unworthy of Āryans, *e. g.* harshness, cruelty, and habitual neglect of prescribed duties (*niṣkriyātmatā*) reveal the real race of a person (p. 828) and his impure birth. Again, he says, that though twice-born persons may beget sons of equal *varṇa*, such sons, if they neglect their obligatory duties, are excluded from Sāvitrī and must be deemed Vrātyas. From such a '*vrātya*' sprung of Brāhmaṇa parents have come the Bhṛjjakaṇṭakas, the Āvantyas, Vāṭadhānas, Puṣpadhas, and Śaikhas (v. l. Śaiśava). From a Kṣatriya *vrātya* have sprung the Jhallas, the Mallas, the Licchavis, Naṭas, Khasas (v. l. Veśas) and Drāvidas. From a Vaiśya *vrātya* have sprung Sudhanvācāryas, Kāruṣas, Vijanamās, Maitras, and Sātvatas.

Sons born of parents of the same *varṇa* are *savarṇāḥ*. The term cannot be applied to persons born as mixed castes. The son of a father of a higher *varṇa* and a woman of the next lower one is classed by Uśanas (p. 814) along with the father. "The person born through a Brāhmaṇa father from a Kṣatriya mother is also a Brāhmaṇa." This dictum is interpreted by Lakṣmīdhara as meaning that he is higher (*utkṛṣṭa*) than a Kṣatriya but lower than a Brāhmaṇa (p. 814). Baudhāyana also declares that a son born of a Vaiśya woman to a Kṣatriya is a Kṣatriya. The view of Uśanas and Baudhāyana is opposed to that of Śaṅkha-likhita, who declare that from a Brāhmaṇa father on a Kṣatriya mother *only a Kṣatriya is born* (p. 814), and similarly when Kṣatriya procreates a son on a Vaiśya woman, and a Vaiśyan a Śūdra woman, the sons are of the *varṇa* of the mothers only.

It may be noted that such marriages (*sambandham*) have been widely in vogue in Keraḷa (Malabar) and the position taken there is that of Śaṅkhalikhita. The sons in such cases, if brought up in the families of fathers, behave like them, and are *almost* like their fathers, and eat with them in the same room, though in different rows (*paṅkti*).

Rise or Fall in Status (*Jātyutkṛṣṭa*, and *Apakṛṣṭa*)

Manu declares that if a woman born of a Brāhmaṇa father and a Śūdra mother bears children to a Brāhmaṇa or the two next *varṇas*, and her female descendants do likewise, they attain the status of the Brāhmaṇa etc. in the *seventh* generation; and conversely, they sink to the level of Śūdras if they act conversely (p. 825). For similar unions in other varṇas fewer generations of such marriage are held to raise the level of the sons. But in Kerala, where in royal and aristocratic families, the custom has been for the women to marry only the highest type of Brāhmaṇa, the Nambūdiri, the children (sons and daughters) though in habits and outlook are like the fathers, are still deemed to belong only to the mother's *varṇa*, though held to be better than common persons of that *varṇa*. The practice is now fading, except in royal families. In such cases, of consistent marriage of women with Brāhmaṇas or higher varṇas, the children are said to lose their varṇa in the 5th genera generation. Thus Baudhāyana (p. 825) states that children of *Niṣādas* on *Niṣāda* women lose their Śūdra status in the fifth generation (The *Niṣāda* is the son of Brāhmaṇa on a Śūdra woman, and is *anuloma* by birth).

Though allowed by some courts in India, marriages between Brāhmaṇas with Śūdra women is among the practices said to be interdicted as *kalivarjya*, to be given up in the Kaliyuga, *i. e.* our times. Similarly, only two types of sons (*aurasa* and *dattaka*) are allowed in Kaliyuga and the others are prohibited for our times. Nevertheless the smṛtis, which are the compositions of this *yuga* mention many types of sons, and Lakṣmīdhara has followed the authorities in dealing with them at length. It is noteworthy that in his work there is no mention of acts forbidden for Kaliyuga (*kalivarjyāḥ*). Neither Medhātithi nor Viśvarūpa make mention of them. The prohibited practices rest mostly on purāṇic authority, and though Lakṣmīdhara cites the great Purāṇas and even some the minor ones, his overlooking the prohibition may either indicate the inclusion of *kalivarjya* passages in purāṇas in late times, or his recognizing that *kalivarjya* customs might still be in vogue and will have to be considered, when they rest on high śāstraic authority.

Rise in status follows not only from the marriage of women of a *varṇa*, generation after generation, with men of a higher varṇa, but by strictly adopting the duties and ways of the superior *varṇa* by the offspring of such unions. This has been so in Kerala. Doing so raises the status of one of a lower *varṇa* in society, above that of his *varṇa*. Conversely, when a person changes his status or profession, he must logically change his *varṇa* also. An instance of it is found in South Indian history. Mayūra *Śarman*, a Brāhmaṇa (as the suffix attached to his name shows) called himself Mayūra *Varman* when he founded a kingdom and became the progenitor of the Kadamba dynasty. The famous story of

the rebuke administered by Rāma Śāstri, the chief judge of Mahārāṣṭra, to the Peshwā Mādhavarāv I, when, for not recognizing him and hearing his report when the chief judge came to make it to the Peshwā, Mādhavarāv pleaded that he was lost in yogic meditation as a Brāhmaṇa should, that a ruler was no Brāhmaṇa proper and must follow the practices of Kṣatriyas, this principle is illustrated.

The many vicissitudes through which every part of India had to pass through the centuries must have made for mixture of varṇas, and mixture again of mixed castes with one another, whether *anuloma* or *pratiloma*, creating numerous subcastes, the members of which followed their own inclinations as regards duties and professions. The long lists cited by Lakṣmīdhara of such groups, *anuloma* and *pratiloma*, and of their professions (*karma*), on pp. 829 to 833, may have gone out of use atleast partially in his own days. Even the rules regarding the places of dwelling for caṇḍālas and their relegation to the duties of public executioners, and compulsion to live apart from villages outside their bounds, living like members of wild tribes, and acting as undertakers to carry corpses of persons without relations (p. 832) may have become modified. Their enunciation in the *nibandha* might be to indicate what may be done for them or persons like them in the kingdom. But even such persons are reclaimable by good acts. Thus, unselfish devotion to others may secure beatitude even to caṇḍālas. "Dying without expectation of reward in defence of Brāhmaṇas and cows, or in defence of women and children, even outcasts win beatitude" (Manu, p. 833). Duties are the same for all, from the caṇḍāla upwards. Lakṣmīdhara cites Devala in enunciating them: "living according to the rules of their caste (*jāti*); protection and conservation of all authority (*sarvapramāṇa*) and attachment to them: maintenance of dependants: avoidance of wrong acts—these are the duties of all from the lowest to the highest (*ācaṇḍāladharmaḥ*). The work ends with a citation from Devala and another from Manu enunciating as the summary of human duties these, *viz.*, abstention from injuring living creatures, truthfulness, abstention from unlawful appropriation of the goods of others, personal purity and self-control:

"A ruler's prosperity" declares Devala, "good name and happiness and sense of duty grow when he sees to it that all subjects, of all *varṇas*, cooperate in sustaining society, by following their appointed duties and functions."

This is an appropriate declaration to append to a digest on Vyavahāra.

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